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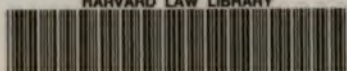
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July 31
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REPORT OF CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF THE

TERRITORY OF ARIZONA

FROM 1896 TO APRIL 16, 1898

E. W. LEWIS
REPORTER

VOLUME FIVE

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⁷ Resigned April 14, 1896.

⁸ Appointed April 30, 1896.

⁹ Appointed July 29, 1897.

¹⁰ Resigned September 27, 1897.

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REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
TERRITORY OF ARIZONA
DURING THE YEAR 1896.

[Civil No. 443. Filed January 11, 1896.]

[43 Pac. 221.]

WILLIAM T. STANFIELD, Plaintiff and Appellant, v.
OLAF M. ANDERSON, Defendant and Appellee.

1. **TRIAL—JURY—DIRECTION OF VERDICT—TEST OF RIGHT TO.**—In this jurisdiction the court may, in a proper case, direct a verdict; but, to authorize such action, the evidence and the reasonable inferences to be drawn therefrom must be insufficient to support a verdict in favor of the party having the *onus* of proof, so that if such a verdict is returned the court would feel compelled to set it aside.
2. **ROADS AND HIGHWAYS — RIGHTS AND DUTIES OF USERS — ORDINARY CARE—NEGLIGENCE — EVIDENCE—DIRECTION OF VERDICT.**—The right of a pedestrian and a horseman to use the public highway being equal, and both alike being under reciprocal obligations to exercise ordinary care,—the one to avoid doing injury, the other to avoid being injured,—it is error for the court to direct a verdict for the defendant where the evidence is, that the plaintiff was walking in the highway; that he had just passed over the ground where the road was soft and covered with straw, which deadened the noise of a horseman who rapidly approached from behind, riding at a furious gait, and, without any warning or attempt to turn to either side or check his horse, rode over and seriously injured plaintiff.
3. **ORDINARY CARE—DEFINED—NEGLIGENCE—WHAT CONSTITUTES—RELATIVE TO EXISTING CIRCUMSTANCES.**—Ordinary care is that degree of precaution which ordinarily prudent persons would exercise under like circumstances. The failure to exercise such care is negligence. Negligence is therefore never absolute or intrinsic, but is always relative to the existing circumstances.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Gila. Owen T. Rouse, Judge. Reversed.

The facts are stated in the opinion.

E. J. Edwards, W. H. Barnes, and J. F. Moriarty, for Appellant.

If there is any evidence, however slight, tending to show negligence, the case should be submitted to the jury; and where the facts are such that from them different minds may reasonably draw different conclusions, the case should be submitted to the jury. Woods on Master and Servant, secs. 76, 82, 84, 85; *Atchison etc. Ry. Co. v. Bailey*, 11 Neb. 333, 9 N. W. 50; *Smith v. S. C. P. Ry. Co.*, 15 Neb. 583, 19 N. W. 638; *Johnson v. M. P. Ry. Co.*, 18 Neb. 690, 26 N. W. 347; *Chicago etc. Ry. Co. v. Wymore*, 40 Neb. 645, 58 N. W. 1120; *Nixon v. Selby S. Co.*, 102 Cal. 458, 36 Pac. 803.

"The rider or driver of a horse must use ordinary care in its management, and is liable for all damages occasioned by his careless riding or driving." Shearman and Redfield on Negligence, sec. 303.

"If a non-negligent foot-traveler is injured by a runaway horse of a negligent person he may have compensation." *Schienfeld v. Norris*, 115 Mass. 17; *Williams v. Grealy*, 112 Mass. 97; Bishop on Non-Contract Law, sec. 1148.

If a person knows his horse to be easily frightened, he is bound to provide against sudden starting, as by the intervening act of third persons. *Bigelow v. Reed*, 51 Mo. 325.

Cox & Street, for Appellee.

BAKER, C. J.—This is an action brought to recover for very serious injuries sustained by the appellant on February 9, 1894, in being run over in a public highway by a horse ridden by the appellee. The charge in the complaint is, that while the appellant was walking along the public highway the appellee approached him from the rear on horseback, going in the same direction as the appellant, and so carelessly and so negligently rode the horse that appellant was run over, and thrown to the ground, and his leg broken, etc. Upon the trial, and at the close of appellant's case, and without any testimony being offered in behalf of the appellee, the court, upon his motion, directed a verdict for him. This is assigned as error. In this jurisdiction, in a proper case, we think the court may

direct a verdict; but to authorize such action the evidence and reasonable inferences to be drawn therefrom must be insufficient to support a verdict in favor of the party having the *onus* of proof, so that, if such a verdict is returned, the court would feel compelled to set it aside. And in passing upon the whole question the judge ought to inquire, not how he himself would vote as a juror, but, taking the jury as fair-minded men, with their different habits of reasoning and dispositions of judgment, could they reasonably differ upon the question? If they could, no matter how clear the judge is himself upon the question, nor how confident he may be that he could vigorously state and vindicate his impressions, he should send the case to the jury.

Now, the right of a pedestrian and a horseman to use the public highway is equal. They are both alike under reciprocal obligations to exercise ordinary care,—the one to avoid doing injury, the other to avoid being injured. Ordinary care is that degree of precaution which ordinarily prudent persons would exercise under like circumstances. The failure to exercise such care is negligence. Negligence is therefore never absolute or intrinsic, but is always relative to the existing circumstances. In this case the evidence is, that appellant was walking in the highway; that just prior to the accident he had passed over ground where the road was soft, and covered with straw, which subdued or deadened the noise of a rapidly approaching horseman; that appellee approached him from behind, riding at a furious gait, and, without any shout of warning or attempt to turn to either side or to check the horse, rode over appellant. He offers no explanation of his conduct. If the horse had escaped his control, and was running away, which is not shown by the evidence, he did not offer to explain that it was without his fault. It is a case where a horseman rides a pedestrian down from behind in the public highway, at a place where his approach was muffled by the condition of the road, and does not consider the circumstance of sufficient moment to require any explanation when called upon to respond in damages. The judge erred in directing a verdict.

The judgment is reversed and a new trial ordered.

Hawkins, J., and Bethune, J., concur.

[Civil No. 452. Filed January 11, 1896.]

[43 Pac. 422.]

FRED G. HUGHES, Defendant and Appellant, v. A. LAZARD, Plaintiff and Appellee.

1. CONSTITUTIONAL LAW—TAXES AND TAXATION—REVENUE ACT, REV. STATS. ARIZ. 1887, TIT. 56, VALID—HARRISON ACT, 1ST SUPP. REV. STATS. U. S., P. 503—SPECIAL LEGISLATION REGULATING PRACTICE IN COURTS OF JUSTICE.—The revenue law of the territory providing that judgment may be entered in the district court for delinquent taxes, without the service of summons or notice thereof upon the owners of property on which the taxes are delinquent other than by publication, is valid and not in conflict with the provision of the Harrison Act, *supra*, providing that the territorial legislature shall pass no local or special act regulating the practice in courts of justice.
2. SAME—SAME—COURTS—SPECIAL PROCEDURE TO COLLECT TAXES.—The territory, through its legislature, can avail itself of the judicial power as the means by which it will collect the taxes; and in such proceedings it may prescribe such procedure as may best avail for that purpose, irrespective of the mode of procedure provided for the determination of controversies between individuals.
3. APPEAL AND ERROR—BILL OF EXCEPTIONS—STATEMENT OF FACTS—EVIDENCE—IMPROPER ADMISSION OF PAROL.—Where the facts are not presented by the bill of exceptions, nor by a statement of facts in the record, error in admitting parol evidence as to facts which could only be established by the records of the board of supervisors cannot be considered.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. Joseph D. Bethune, Judge. Affirmed.

The facts are stated in the opinion.

William M. Lovell, for Appellant.

Selim M. Franklin, for Appellee.

ROUSE, J.—This is an action in ejectment for the north half of lot 4 in block 223 in the city of Tucson. The said lot had been sold to the territory for the taxes for the year 1890, which had become delinquent. The time for redemption hav-

ing expired, a tax-deed was duly executed to the territory for said lot. Thereafter the board of supervisors of Pima County sold said lot to plaintiff, and executed a deed to him therefor. Plaintiff bases his right of action for the possession of said lot on the title created by said tax-deed. Defendant contends that the tax-deed to the territory is void, because the territorial revenue law, relating to bringing suits and obtaining judgments against property for delinquent taxes, is a special law, "regulating the practice in courts of justice," and violates the provisions of the act of Congress of 1886, commonly called the "Harrison Act."

No question is presented by the record as to the regularity of all the proceedings under the revenue law of the territory. Therefore, if the said revenue law is not in conflict with the provisions of the act of Congress commonly called the "Harrison Act," by reason of the fact that it is a special law "regulating the practice in courts of justice," the title of plaintiff to said lot is valid. The said act of Congress contains the following: "That the legislatures of the territories of the United States, now or hereafter to be organized, shall not pass local or special laws in any of the following enumerated cases, that is to say: Granting divorces. Changing the names of persons or places. Laying out, opening, altering, and working roads or highways. Vacating roads, town plats, streets, alleys, and public grounds. Locating and changing county seats. Regulating county and township affairs. Regulating the practice in courts of justice. Regulating the jurisdiction and duties of justices of the peace, police magistrates, and constables. Providing for change of venue in civil and criminal cases. . . . Providing for the management of common schools. Regulating the rate of interest on money. . . . The sale or mortgaging of real estate belonging to minors or others under disability. . . . In all other cases where a general law can be made applicable, no special law shall be enacted in any of the territories of the United States by the territorial legislatures thereof." The purpose of said act is to prevent local or special laws in the cases enumerated. The distinction between a special and a general law may not be capable of being formulated in a definition which will be exhaustive of the subject, and applicable to every case; and the question may be better determined upon a consideration of each particular case pre-

sented for its application by taking into view the purpose and character of the law, as well as the individuals upon whom it is to operate. *People v. Central Pacific R. R. Co.*, 105 Cal, 576, 38 Pac. 905. The further purpose of said act is to prevent special laws from being made in other cases where a general law can be made applicable. First: The act prohibits the making of a law "granting divorces." That cannot be construed to mean that a law by which divorces may be granted cannot be enacted. If that should be the construction of said act, there could be no more divorces granted in this territory. The proper construction to be placed thereon is, that divorces cannot be granted by an act of the legislature. Second: "Laying out, opening, altering, and working roads or highways." This provision cannot be construed to mean that a law cannot be made providing for the establishing of roads and for working them. Third: "Providing for change of venue in civil and criminal cases." This provision must certainly be construed to mean that changes of venue may be provided for, and may be had, but that a law with reference thereto must contain provisions which would enable all parties who can comply with the conditions imposed to have the benefit thereof. So, by examining each class enumerated in the act, it will not be difficult to understand the purpose thereof. The provision of said act to which attention is called, and on which appellant relies, is as follows: "Regulating the practice in courts of justice." It is contended that as the revenue law provides that judgment may be entered in the district courts for the delinquent taxes, and that no summons or notice thereof is served upon the owners of the property on which the taxes are delinquent other than by publication, such law "regulates the practice in courts of justice," and is in conflict with the provisions of said act of Congress, and for that reason void. In support of that view, the case of *People v. Central Pacific R. R. Co.*, 83 Cal. 393, 23 Pac. 303, is cited. The case cited involved the construction of a statute of California, which specified the mode to be pursued in the assessment and collection of taxes from railroads which were constructed through two or more counties of the state. The act did not apply to all railroads. Though, in the opinion in that case, it was stated that said law was in conflict with that provision of the constitution of California prohibiting the making

of a law "regulating the practice in courts of justice," the same court declared in the case of *People v. Central Pacific R. R. Co.*, 105 Cal. 576, 38 Pac. 905, that said statement "must be regarded as *obiter dicta*," and in said last case sustained said law. The tax is an obligation from the citizen to the territory. It is not of the same character of obligations as exist between citizens; and for the purposes of its collection, the territory is not limited to the mode or to the same procedure which it prescribes for individuals in the collection of obligations between themselves. The collection of taxes is not the mere collection of a debt, but it is the sovereign act of the territory, to be exercised as may be prescribed by the legislature. The territory, through its legislature, can avail itself of the judicial power as the means by which it will collect the taxes; and in such proceedings it may prescribe such procedure as may best avail for that purpose, irrespective of the mode of procedure provided for the determination of controversies between individuals. *People v. Central Pacific R. R. Co.*, 105 Cal. 576, 38 Pac. 905.

Appellant contends that the district court erred in admitting parol evidence to show some things which had been done by the board of supervisors with reference to steps taken for the collection of the taxes due on the property in question, which could only be established by the records of the board of supervisors. As the facts are not presented by the bill of exceptions, nor by a statement of the facts in the record, we cannot consider that point. The judgment is affirmed.

Hawkins, J., concurs.

Baker, C. J., concurs in the judgment.

[Civil No. 474. Filed January 18, 1896.]

[43 Pac. 220.]

JOHN PEMBERTON, Defendant and Appellant, v. W. H. DURYEA, Plaintiff and Appellee.

1. ANSWER—TIME TO—COMPUTATION OF—HOLIDAYS—SUNDAY—DEFAULT—REV. STATS. ARIZ. 1887, PARS. 696 (SUBD. 1), 2069, 2068, CONSTRUED.—Paragraph 696, *supra*, provides: "The time in which summons shall require the defendant to answer the complaint shall be as follows: (1) If the defendant is served within the county in which the action is brought, ten days." Paragraph 2069, *supra*, provides: "The time in which any act provided by law to be done, is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded." Paragraph 2068, *supra*, provides that every Sunday is a legal holiday. Where summons was served upon April 11, 1895, in the county where suit was brought, and default and judgment was entered on April 22, 1895, such default and judgment was premature, April 21st being Sunday, and thus defendant had all of the following day, the 22d, in which to file his answer.
2. SAME—SAME—DEFAULT—PREMATURE—SETTING ASIDE—AFFIDAVIT OF MERITS.—Where the statutory time for answer has not expired, defendant has an absolute right to have a premature judgment set aside, upon motion, without an affidavit of merits.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Gila. Owen T. Rouse, Judge. Reversed.

The facts are stated in the opinion.

P. M. Thurmond, for Appellant.

Peter T. Robertson, for Appellee.

BAKER, C. J.—The action was brought upon a promissory note for three hundred and fifty dollars, with interest, executed by the appellant, payable to the order of L. K. Smith, and transferred by Smith to appellee. The note is alleged to be lost. Summons was served upon appellant on the eleventh day of April, 1895, in Gila County, and on the twenty-second day of April, 1895, the default of appellant was entered; and on the same day (April 22d) final judgment was entered

against him in the suit for the sum of four hundred and ninety-four dollars, the amount claimed to be then due on said lost note, principal, and interest. On the twenty-seventh day of April, 1895, being a day of the same term, the appellant moved the court to set aside the judgment against him, and that he be allowed to appear and defend against the note, for the reason that such judgment was entered before the time to answer or appear in the suit had expired. The motion was accompanied by an affidavit of merits. It was heard on April 29, 1895, and denied. This action of the court is assigned as error.

The judgment was unquestionably premature. "The time in which summons shall require the defendant to answer the complaint shall be as follows: (1) If the defendant is served within the county in which the action is brought, ten days." Rev. Stats., par. 696, subd. 1. "The time in which any act provided by law is to be done, is computed by excluding the first day and including the last, unless the last day is a holiday; and then it is also excluded." Id., par. 2069. Every Sunday is declared to be a legal holiday by paragraph 2068 of the Revised Statutes of Arizona. The tenth day, computed by excluding the first and including the last, and upon which the appellant was to answer in the suit, fell on Sunday, April 21st; but, as this was a legal holiday, it is also to be excluded. Thus, the appellant had all of the following day, April 22d, in which to file his answer. He therefore was not in default when the judgment was entered against him. He had nothing to excuse. The statutory time for answering had not yet expired. His right to have the default set aside, and be heard to defend, was absolute. No affidavit of merits was necessary. 1 Black on Judgments, sec. 347. The entering of the judgment was unseasonable, and it should have been vacated by the court upon its attention being called thereto, and the appellant allowed to defend, without requiring any affidavit of merits whatever. Judgment reversed, and case remanded for further proceedings.

Hawkins, J., and Bethune, J., concur.

[Civil No. 469. Filed January 20, 1896.]

[43 Pac. 221.]

JOHN SROUFE and CHARLES J. CROWELL, Partners,
doing business under the firm name and style of JOHN
SROUFE & CO., Defendants and Appellants, v. SOTO
BROS. & CO., Plaintiffs and Appellees.

1. ACTION—PARTIES—REAL PARTY IN INTEREST—ASSIGNEES FOR COLLECTION ONLY—REV. STATS. ARIZ. 1887, PARS. 680, 681, SECS. 32, 33, AND LAWS 1893, ACT NO. 22, P. 16, AMENDATORY THERETO, CONSTRUED.—The statute, *supra*, amending paragraph 680, *supra*, provides: "Every action shall be prosecuted in the name of the real party in interest; provided, an executor or an administrator, or a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is brought. A person with whom or in whose name a contract for the benefit of another is made, and the assignee of any chose in action is a trustee of an express trust, within the meaning of this section." Under this statute the assignee of an account for the purpose of collection only, as the holder of the legal title, can sue for and recover the whole amount thereof.

HAWKINS, J., dissents on the ground of failure of proof.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Cochise. Joseph D. Bethune, Judge. Affirmed.

The facts are stated in the opinion.

Barnes & Martin, for Appellants.

It was held in *Ritter v. Stevenson*, a case similar to the one at bar, that such an assignment as this is void, and holds the plaintiff is not the real party in interest. *Ritter v. Stevenson*, 7 Cal. 388. This was reaffirmed in *Ritter v. Stevenson*, 11 Cal. 27, and cited with approval in *Shyrme v. Occidental Mill Co.*, 8 Nev. 231.

The case of *Bostwick v. Bryant*, 113 Ind. 448, 16 N. W. 378, holds that a note transferred and assigned without consideration, solely for the purpose of suing and collecting the same for the benefit of the assignor, cannot be sued for in the name of the assignee, because he is not the real party in interest.

Robins v. Deverell, 20 Wis. 148, holds that such assignee is not the real party in interest nor a trustee of an express trust.

Hoagland v. Van Ellen, 22 Neb. 681, 35 N. W. 869, lays down the doctrine that the real party in interest is the person entitled to the avails of the suit, and holds such an assignment as this to be void. To the same effect is *National Bank v. Hollister*, 21 Minn. 385; *National Bank v. Clark*, 23 Minn. 263; *Iselin v. Rowlands*, 30 Hun, 488; *Bell v. Tilden*, 16 Hun, 346; *Abrams v. Cureton*, 74 N. C. 523.

Heney & Ford, for Appellees.

The following cases hold that an assignee of a chose in action for the purposes of collection and suit is the real party in interest within the purview of statutes similar to our own. Further discussion seems unnecessary. *Allen v. Brown*, 44 N. Y. 228; *Meeker v. Flaghorn*, 44 N. Y. 349; *Wetmore v. San Francisco*, 44 Cal. 294; *Durgin v. Ireland*, 14 N. Y. 322; *Castner v. Sumner*, 2 Minn. 444; *Williams v. Norton*, 3 Kan. 395, 89 Am. Dec. 594; *Cuttle v. Cole*, 20 Iowa, 481; *Curtis v. Mohr*, 18 Wis. 615; *Hilton v. Waring*, 7 Wis. 492; *Wilson v. Clark*, 11 Ind. 385; *Gradwohl v. Harris*, 29 Cal. 150; *Cummings v. Morris*, 25 N. Y. 625.

ROUSE, J.—This is an action on an account. Plaintiffs had sold and delivered merchandise to defendants, and on that account claimed a balance of \$1,399.05. They also claim \$1,058.80, balance due on an account due one Charles Noble, and \$1,240.78, balance due on an account due J. Leberman & Co. The last two claims mentioned had been assigned to plaintiffs. Defendants, in their answer, deny plaintiffs' right to maintain an action on the two assigned accounts, for the reason that said accounts had been transferred to plaintiffs for collection; that as to said accounts plaintiffs are not the real parties in interest, and cannot maintain the action on said accounts. The right of a party to maintain an action on an account which has been assigned to him for the purpose of collection only is the question presented by the record in this case. The Revised Statutes of Arizona of 1887 contain the following:—

“Par. 680. Every action shall be prosecuted in the name of the real party in interest, except as otherwise prescribed.

"Par. 681. In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off, or other defense existing at the time of, or before notice of the assignment. . . ."

The statute is plain that every action shall be prosecuted in the name of the real party in interest, and we think that it is equally clear that by the provisions of paragraph 681, *supra*, in the case of an assignment of a thing in action (an account), the assignee is the real party in interest. Appellants contend that in this case, as the assignments, though complete in form, were made only for the purpose of authorizing the appellees to sue thereon, by establishing that fact, the right of action, as to said assigned accounts, could not be maintained. It appears to us that there do not remain any grounds for that contention, since the amendment to paragraph 680, enacted in 1893, and found on page 26 of the Session Laws of the seventeenth legislative assembly. Said amendment is as follows: "Every action shall be prosecuted in the name of the real party in interest, provided, an executor or administrator, or a trustee of an express trust, or a person expressly authorized by the statute, may sue without joining with him the person for whose benefit the action is brought. A person with whom or in whose name a contract for the benefit of another is made, and the assignee of any chose in action is a trustee of an express trust, within the meaning of this section." Though it was in fact understood by the parties that the beneficial interests to pass by the assignment were limited, still the plaintiffs, as holders of the legal title of said accounts, could sue for and recover the whole amount thereof. *Gradwohl v. Harris*, 29 Cal. 150; *Allen v. Brown*, 44 N. Y. 228; *Meeker v. Claghorn*, 44 N. Y. 349; *Sheridan v. Mayor etc. of New York*, 68 N. Y. 30; *Eaton v. Alger*, 47 N. Y. 345; *Young v. Hudson*, 99 Mo. 102, 12 S. W. 632.

The judgment of the district court is affirmed.

Baker, C. J., concurs.

HAWKINS, J., dissenting.—I agree with my associates in the reasoning of the foregoing opinion, but do not think the evidence sufficiently proves the agency of De Long to bind Sroufe & Co., and therefore think the case should be reversed, and a new trial granted.

[Civil No. 472. Filed January 20, 1896.]

[43 Pac. 222.]

UNITED STATES OF AMERICA, Plaintiff and Appellant,
v. PHILIP DRACHMAN et al., Defendants and Ap-
pellees.

1. EVIDENCE—ACCOUNT OF WAR DEPARTMENT—TREASURY TRANSCRIPT—REV. STATS. U. S., SEC. 886, CONSTRUED—UNITED STATES v. ELLIS, 2 ARIZ. 253, 14 PAC. 300, FOLLOWED.—In an action for damages brought by the United States against a party who failed to comply with his bid to furnish supplies to the war department, and the guarantors upon his bid, a United States treasury transcript, duly certified under section 886, *supra*, showing the advertisement for the bid, the proposal of the defendant, the guaranty of his co-defendants, the notice to defendant of the acceptance of his bid, the letter of defendant refusing to enter into the contract and bond required, the itemized statement and account showing that purchases by the government in consequence of the default of defendant, should be received in evidence, the suit involving an account. *United States v. Ellis*, 2 Ariz. 253, 14 Pac. 300, followed.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. Joseph D. Bethune, Judge. Reversed.

The facts are stated in the opinion.

E. E. Ellinwood, United States District Attorney, for Appellant.

Barnes & Martin, for Appellees.

BAKER, C. J.—This action was brought to recover \$5,988.16, damages accruing to the United States by reason of Philip Drachman's failing to comply with his bid to furnish certain supplies (hay) for the use of the government at its military post at Fort Huachuca, in this territory. The appellee Dennis was a guarantor upon the bid of said Drachman. Drachman defaulted, and failed to comply with his bid, and the government bought the supplies in open market, the difference between the bid and the price paid for the supplies in open market being the amount claimed as damages

in this suit. On the trial of the cause, the appellant offered in evidence a United States treasury transcript, duly certified, under section 886 of the Revised Statutes of the United States, showing the following facts: April 1, 1885, Major A. J. McGonnigle, chief quartermaster of the department of Arizona, advertised, in accordance with the regulations of the war department, for proposals for military supplies to be furnished during the fiscal year 1886. Among the other supplies for which proposals were asked were 1,400,000 pounds of hay, to be delivered at Fort Huachuca, Arizona; the hay to be well and securely stacked, and in the post-yard, and wild hay of the best quality in the vicinity of the place of delivery. The advertisement further stipulated that the bidder must state the kind and quality of hay to be furnished, whether alfalfa, grama, barley, or bottom, and that none but machine- or scythe-cut hay would be received. In accordance with this advertisement, the defendant Philip Drachman duly submitted his proposal to furnish at Fort Huachuca, Arizona, 1,400,000 pounds of grama hay, cut with a machine, at the rate of ninety-three cents per one hundred pounds, which quantity, under the proposal, might, at the option of the government, be increased by twenty per cent, should the circumstances of the service require it. Accompanying this bid was the guaranty of defendants John T. Dennis and H. Goldberg, binding themselves that, within ten days after acceptance, the said Drachman would enter into a contract with appellant to furnish said hay, and give a good and sufficient bond, and if the said bidder failed so to do, that the said guarantors would pay to the appellant the difference in money between the amount of the bid of said bidder and the amount for which the proper officer of the United States might contract with another party for said supplies. Included in this transcript is the notice to defendant of the acceptance of his bid, inclosing contract and bond, and the letter of defendant Drachman declining to enter into the agreed contract and to furnish the required bond. Also included in the treasury transcript is the itemized statement and account showing the purchases by the government in consequence of the default of the defendant Drachman. The appellees objected to the introduction of the transcript mainly for the reason that such transcripts are admissible in suits against revenue officers or other persons

accountable for public moneys only, and that, appellees being in no such relationship to the government, it is not admissible in the suit. The objection was sustained, and the transcript excluded. The question therefore is, Did the court err in rejecting the treasury transcript?

Section 886 of the Revised Statutes of the United States is as follows: "When suit is brought in any case of delinquency of a revenue officer, or other person accountable for public money, a transcript from the books and proceedings of the treasury department, certified by the register and authenticated under the seal of the department, or when the suit involves the accounts of the war or navy departments, certified by the auditors respectively charged with the examination of those accounts, and authenticated under the seal of the treasury department, shall be admitted as evidence and the court trying the case shall be authorized to grant judgment and award execution accordingly. And all copies of bonds, contracts, or other papers relating to, or connected with the settlement of, any account between the United States and an individual, when certified by the register, or such auditor, as the case may be, to be true copies of the originals on file, and authenticated under the seal of the department, may be annexed to such transcript, and have equal validity and be entitled to the same degree of credit which would be due to the original papers if produced and authenticated in court." It appears from the statement of facts that an account of the war department is involved in the suit, and that is a sufficient answer to the objection of appellees. A similar ruling is made in the case of *United States v. Griffith*, 2 Cranch C. C. 366, Fed. Cas. No. 15,263. We also have a precedent arising in this court. Upon a contract to deliver barley to the quartermaster of Fort McDowell for the use of the government the contractor defaulted, and suit was brought against him to recover the penalty of his bond. A treasury transcript was introduced in evidence by the government, showing the contract, bond, account, etc., as appearing in the records of the war department. The court said: "This disposes of all of the objections in the case that we should or can properly consider, but we have, notwithstanding this fact, looked into the record, and find that all of the documents and vouchers were properly authenticated by the proper auditor

of the treasury having charge of the accounts of the war department, and are made evidence by virtue of section 886 of the Revised Statutes. These authenticated copies make out a *prima facie* case, and it devolves, then, upon the defendant to defeat the same by competent evidence." *United States v. Ellis*, 2 Ariz. 253, 14 Pac. 300.

It follows that the lower court erred in sustaining the objection to the transcript, and the judgment is therefore reversed, and a new trial ordered.

Rouse, J., and Hawkins, J., concur.

[Civil No. 427. Filed January 21, 1896.]

[43 Pac. 219.]

JOHN PALMER, Defendant and Appellant, v. J. II.
BREED, Plaintiff and Appellee.

1. PLEADING—DEMURRER—SEPARATE COUNTS.—Where a complaint contains several counts, a general demurrer thereto upon the ground that it fails to state facts sufficient to constitute a cause of action will be overruled if either one of the counts be sufficient.
2. SAME—SEPARATE COUNTS—INSUFFICIENCY OF COUNT—HOW REACHED—SEPARATE DEMURRER.—The proper procedure where there are several counts in the complaint, and one or more be insufficient, is to demur to each of such counts separately.
3. SAME—ATTACHMENT—EXCESSIVE LEVY—DAMAGES—COMPLAINT—SUFFICIENCY.—A complaint which alleges that defendant in a suit against plaintiff for \$702.13 caused the sheriff to levy a writ of attachment upon plaintiff's property to the amount of \$6,500, and furthermore procured the sum of \$662 due plaintiff to be garnished; that such levies were excessive and unreasonable, and were made at defendant's direction, wantonly, and with a view to oppress and injure plaintiff, and did oppress and injure him to his damage, etc., states a cause of action.
4. ATTACHMENT—EXCESSIVE LEVY—TRESPASS—ONE DIRECTING LEVY LIABLE WITH OFFICER.—One who directs an officer to execute a writ of attachment in an oppressive and unreasonable manner, with the intent of damaging the debtor, is equally a trespasser with such officer.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Yavapai. John J. Hawkins, Judge. Reversed.

The facts are stated in the opinion.

J. F. Wilson, and Robert E. Morrison, for Appellant.

Where an officer levies a writ on property for the collection of a specific sum, and in doing it he seizes the whole estate of the debtor, or property entirely too much, and out of all reasonable proportion to the amount required to secure the demand, he at once becomes a minister of oppression, and not of justice; and for any damage occasioned by it, he is liable; and the party in whose interest the levy is so made who directs, commands, and causes it, is likewise liable.

That the officer is liable, see *Cook v. Jenkins & Co.*, 30 Iowa, 452; *Hilliard v. Wilson*, 65 Tex. 286; *Silver v. McNeil*, 52 Mo. 518; *Handy v. Clippert*, 50 Mich. 355, 15 N. W. 507. These authorities make the sheriff liable as a trespasser.

That the execution plaintiff, or attaching plaintiff, is also liable, see *Hilliard v. Wilson*, 65 Tex. 288; *Wetzell v. Waters*, 18 Mo. 396; *Cook v. Hopper*, 23 Mich. 511; *Knight v. Nelson*, 117 Mass. 458; *Tompkins v. Haile*, 3 Wend. 406; *Root v. Chandler*, 10 Wend. 11, 24 Am. Dec. 198.

T. W. Johnston, for Appellee.

"The amount for which the levy is made, as set forth in the writ, is the only guide the officer has in this respect. The duty is not incumbent upon him to give judgment upon the matters in issue, so far as to determine whether or not the plaintiff is to recover such sum. Consequently he cannot regulate his levy by any other standard than that contained in the process. But he is not limited to this sum in making the levy. He may levy upon property greater in value, according to his own estimation, without acting illegally or oppressively in the matter. And yet he has not an uncontrolled discretion in the quantity or value of property upon which to place a lien. Nor can he be altogether directed by the plaintiff or defendant in the matter. The former cannot extend nor the latter limit the levy at will. The officer must exercise reasonable judgment in determining the quantity of property

of defendant he must subject to the lien.... If the levy is excessive, the defendant may, upon application by petition, have the same reduced." 1 Wade on Attachment, sec. 127; *Merrill v. Curtiss*, 18 Me. 272; *Fitz v. Blake*, 42 Barb. 513; *Thornton v. Winter*, 9 Ala. 613; *Hughes v. Tennison*, 3 Tenn. Ch. 641.

In other words, it is the officer, and not the plaintiff, in attachment who controls the amount of the levy, and is responsible for any oppressive consequence which may follow.

In the case of *Hilliard v. Wilson*, 65 Tex. 288, cited and relied on by appellant, the complaint alleged that the plaintiffs "indemnified the sheriff for the purpose of inducing him to carry out their unlawful designs, combined and confederated with him to sacrifice the property of the appellant, which have been levied on under the writ."

In this case there is no suggestion of any such conduct on the part of this appellee. Nor is there any suggestion that the realty levied on was harmed. Nor could there be any appreciable harm done to realty, because there is no seizure. *Heath v. Lent*, 1 Cal. 410.

BAKER, C. J.—The complaint in the case consisted of four several counts, purporting to set up as many causes of action. A general demurrer to the whole complaint was interposed upon the ground that a cause of action was not stated. It was sustained. The appellant declined to amend, and stands upon his complaint and brings this appeal.

The rule is well settled that where a complaint contains several counts a general demurrer thereto upon the ground that it fails to state facts sufficient to constitute a cause of action will be overruled if either one of the counts be sufficient. Maxwell on Code Pleading, 375. The proper procedure where there are several counts in the complaint, and one or more be insufficient, is to demur to each of such counts separately. *Id.* In the first count it is charged that the defendant (the appellee here) sued the plaintiff (appellant here) for \$702.13, and caused a writ of attachment to issue in the suit; that he placed it in the hands of the sheriff, and pointed out, directed, and caused him to levy such writ upon plaintiff's property to the amount and value of \$6,500, and furthermore procured the sum of \$662 to be garnished in the hands of one of plain-

tiff's debtors; that such levies were made at the instigation and in obedience to the commands of the defendant; and that they were excessive and unreasonable, and were made at the direction and command of the defendant, wantonly, and with a view to oppress and injure the plaintiff, and did damage, oppress, and injure him, etc. This charges the officer with acts that the writ did not justify, and from the consequences of which it could not shield him. It is not an ordinary suit for maliciously suing out a writ of attachment. The gravamen is the abuse of the writ in seizing more property than was required to satisfy it and costs, for the purpose and with the intent of oppressing and damaging the debtor. If an officer intentionally execute a writ in an oppressive and excessive manner in order to damage the debtor, and does damage him, he is as much a trespasser as if he was acting without any process whatever. He is, or should be, a minister of justice, not of oppression, and must execute every writ put into his hands in such a manner as to do as little mischief to the defendant as possible. *Handy v. Clippert*, 50 Mich. 355, 15 N. W. 507. It is charged that the defendant instigated, directed, and commanded the excessive and oppressive levy with the view to damage the plaintiff. He was therefore equally a trespasser with the officer. *Hilliard v. Wilson*, 65 Tex. 286. It is but fair to the usually cautious and painstaking judge who passed upon the pleading below to state that the complaint is scarcely to be treated as a model of perspicuity. The demurrer, however, should have been overruled. The judgment is reversed.

Bethune, J., and Rouse, J., concur.

[Civil No. 437. Filed January 23, 1896.]

[43 Pac. 527.]

R. T. ROOT, Defendant and Appellant, v. HARLEY FAY,
Plaintiff and Appellee.

1. PLEADING—PRINCIPAL AND AGENT—DECLARATION AGAINST PRINCIPAL
—EVIDENCE OF CONTRACT WITH AGENT—ADMISSIBILITY.—In an action to recover commission for the sale of a mine, evidence as to a

contract for such commission made with an agent of defendant is admissible, though the pleading declares upon a contract with the principal direct.

2. **PRINCIPAL AND AGENT—EVIDENCE — AGENCY — CIRCUMSTANCES — INSUFFICIENCY.**—Evidence was that plaintiff entered into a contract with one Mathews for a commission for inducing the owners of a certain mine to make a trade; that he secured an option thereon and put the owners and Mathews in communication; that after making this contract Mathews went to Denver, where the defendant, Root, lived; that Root came and examined the mine; that one of the owners received a telegram at San Francisco, California, from Kingman, Arizona, where the mine was, signed J. H. Mathews, requesting him to go to Los Angeles and meet Mathews; that upon arriving he was met by one Barry, who said, "We are Mathews," and introduced Root; that Root had accompanied Barry to California, but denied all knowledge of the telegram, and, though the sale of the mine was consummated at that time, denied all responsibility for the commission. Though agency may be implied from acts and circumstances, the evidence is insufficient to establish that Mathews was the agent of Root.
3. **EVIDENCE—INSUFFICIENCY—DIRECTION OF VERDICT.**—Where the evidence is insufficient to sustain a verdict for the plaintiff, it is error for the trial court to deny defendant's motion, made at the close of plaintiff's case, to direct the jury to return a verdict in his favor.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Mohave. John J. Hawkins, Judge. Reversed.

The facts are stated in the opinion.

Herndon & Norris, for Appellant.

The only fact which the plaintiff attempted to prove was to show that Mathews and Barry were Root's agents, authorized to agree to pay plaintiff five thousand dollars for the work which he alleged he performed. No such cause of action was declared on by the plaintiff. If C. W. Barry and Mathews were Root's agents, authorized by him to do certain acts, and if they contracted on his behalf, he individually is liable, and he is not jointly liable with them; but plaintiff having alleged that the contract was made by Root, Mathews, and Barry jointly, it was improper for plaintiff to be allowed to show that Root alone was the contracting party, and that Mathews and Barry were merely agents.

An agent incurs no liability if he discloses his principal. If Mathews and Barry made it known to plaintiff that Root was their principal, then said Mathews and Barry should not have been made parties to the suit. *Mechem on Agency*, par. 555; *Whitney v. Wyman*, 101 U. S. 392; *Mahoney v. Kent*, 7 Misc. Rep. 726, 28 N. Y. Supp. 19.

A party cannot hold both the principal and the agent in an action upon a contract. *Mechem on Agency*, par. 698; *Silver v. Jordan*, 136 Mass. 319; *In re Bateman*, 7 Misc. Rep. 633, 28 N. Y. Supp. 36.

If, however, Mathews and Barry did not claim or assume to act as Root's agents, then he cannot be bound by anything they did by reason of any doctrine of ratification. To bind a principal by ratification, the ratified acts must have been done by the assumed agent, *as agent*, and upon behalf of the principal. If the assumed agents act as principals and on their own account, their acts cannot thus be ratified. *Mechem on Agency*, par. 127; *Commercial Bank v. Jones*, 18 Tex. 811; *Bennecks v. Life Insurance Co.*, 105 U. S. 355; *Owings v. Hill*, 9 Pet. 607; *Seymour v. Wickoff*, 10 N. Y. 213.

Plaintiff having failed to establish his cause of action, it was the duty of the court to so instruct the jury and direct a verdict for the defendant. *Improvement and R. R. Co. v. Munson*, 81 U. S. 442; *Parks v. Ross*, 11 How. 362; *Pleasants v. Fant*, 22 Wall. 122; *Greening v. Bishop*, 39 Wis. 552; *Johnson v. Moss*, 45 Cal. 515; *Wills v. Lynn etc. R. R. Co.*, 129 Mass. 351.

Stewart & Doe, and J. C. Campbell, for Appellee.

BAKER, C. J.—This is an action to recover five thousand dollars as commission for the sale of mining property. The plaintiff had judgment, and defendant appeals. The plaintiff made his contract with one J. H. Mathews, and his theory is, that Mathews was the agent of the defendant in and about the purchase of the property. The record is greatly encumbered with objections and exceptions on the part of the defendant to the rulings of the court in the admission of testimony. They are all based upon the idea that the plaintiff could only show a contract direct with the defendant, but it is elementary that whatever a person may legally do himself

he may legally do by the hand of another. Neither is it an objection that the pleadings do not disclose the agency, for it is the theory of the law that the act of the agent is the act of the principal. The principal may therefore be declared against direct.

The whole of the evidence is substantially as follows: The plaintiff made a contract with one J. H. Mathews to the effect that if he (plaintiff) induced the owners of certain mines situate in the White Hills, Mohave County, Arizona, to sell the same on a basis of two hundred thousand dollars, the plaintiff was to have ten thousand dollars commission; or, if he had anything out of which to secure a trade for the property, he was to have five thousand dollars. The plaintiff went to San Francisco and obtained an option upon the property for twelve days from the owners, and placed the owners and said Mathews in communication with each other. There was frequent telegraphic communications between plaintiff and Mathews about the property. After making this contract Mathews went to Denver, where the defendant, Root, lived. Root came into the territory and examined the property. One of the owners (Schaefer) received a telegram at San Francisco, California, from Kingman, Arizona, signed J. H. Mathews, requesting him to go to Los Angeles, California, and meet Mathews. Upon arriving in Los Angeles, he was met by one C. W. Barry, who said, "We are Mathews," and introduced him to Root. Root had accompanied Barry to California, but denied all knowledge of the telegram. The sale of the mines to the defendant was consummated at that time. Root, when asked to pay plaintiff, admitted that plaintiff had spent money in the matter, but denied that he was responsible for the commissions.

Giving to this testimony full scope, and every fair inference, it is clearly insufficient to establish that Mathews was the agent of Root. There is no question but that an agency may be implied from the acts and conduct of the parties (Wharton on Agency, secs. 44, 121); but it is not at all clear to us upon what act or series of acts, or conduct, such an inference can reasonably be drawn in this case. The isolated fact that the defendant went to Los Angeles, California, in company with one Barry, and met one of the owners (Schaefer), who had received a telegram signed by Mathews to also go to

Los Angeles, is not a convincing circumstance, and that is the strongest circumstance in the whole case.

At the close of plaintiff's case the defendant moved the court to direct the jury to return a verdict in his favor. The motion was denied. We think it should have been granted. The practice of directing a verdict in a proper case has the advantage of saving expense to the litigants and insuring certainty in the application of the law to the facts. Applying the test, and perhaps the best test, for the exercise of this power, would the verdict be permitted to stand if one was returned for the plaintiff? We think the jury should have been instructed to find for the defendant. The judgment is therefore reversed and a new trial ordered.

Rouse, J., and Bethune, J., concur.

[Civil No. 479. Filed January 23, 1896.]

[43 Pac. 527.]

FEREMAN SALCIDO, Defendant and Appellant, v.
CHARLES B. GENUNG, Plaintiff and Appellee.

1. EJECTMENT—RIGHT TO MAINTAIN—EVIDENCE OF TRANSFER OF TITLE BY PLAINTIFF BEFORE SUIT FILED.—Where the evidence of plaintiff in an action of ejectment discloses that he had sold the property several months before suit was filed, and there is no evidence of a retransfer to or of present right of possession in plaintiff, judgment should be entered for defendant.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge. Reversed.

The facts are stated in the opinion.

Millay & Bennett, for Appellant.

Fitch & Campbell, for Appellee.

BETHUNE, J.—This is an action of ejectment for the possession of the northeast one fourth of section sixteen, town-

ship one north, range two east, Gila and Salt River base and meridian, Maricopa County, by appellee, Charles B. Genung, who was the plaintiff in the court below, and who alleges in his complaint that, ever since the first day of October, 1884, and long prior thereto, he and his grantors and predecessors in interest have been entitled to the possession, and until the ouster herein complained of were in the actual, peaceable, and quiet possession, and that appellee is now entitled to the possession of said land. The record shows that the land in question is a part of the lands reserved by section 1946 of the Revised Statutes of the United States for the purpose of being applied to schools in this territory, and in the state to be erected out of it; that Genung went upon the land in 1885, having "bought the piece from the man who had it," cleared off about eighty acres, fenced it, and subdivided it, and planted it in grain, and built a house upon it, costing in the neighborhood of two thousand dollars, and lived there with his family; had all but twenty acres of the land fenced and under cultivation. In the fall of 1889 or 1890 the house burned, and appellee lived on the place in tents until April following, when he put Salcido (appellant here) upon the land, and moved to People's Valley, in Yavapai County, with his family, and has resided there ever since. Quoting the language of appellee, as it appears further on in the transcript: "I put Salcido on the ranch with the understanding that I wanted to sell the ranch. Our agreement was that he was to stay on the ranch until I sold it, and he was to have all he could make off the ranch. I had a big crop of alfalfa there, and eighteen or twenty horses; and I reserved the privilege of keeping the horses there, and a few head of steers, until I sold it, and I gave him the use of the place for taking care of it; and I made this further agreement with him, that if he bought water and raised a crop, and if I sold the place while he had a crop growing upon it, if he had to get off, I agreed to pay him a reasonable remuneration for the expense that he had been put to. He went on the ranch in pursuance of these agreements. . . . I cannot remember when was the first time I ever heard of his making any adverse claim to it, or claiming it for himself; but I sold the place and gave Mr. Goldman an order for it, and he went and presented the order, and Salcido ignored it. That was a little

more than a year ago. I think it was some time in 1894, and this is the first time that I had notice of any assertion of title in Salcido." And, further on, on cross-examination: "I have had no cattle or stock on that place since the fall of the year I left there. I have not had anything off the place since then. I have not done anything on the place since then." Jensen, a witness for appellee, testified that he had a power of attorney from appellee to sell the place, and had two conversations with appellant in reference to selling the place,—one conversation about four years before the trial, in which Salcido said Jensen could dispose of the place at any time, that he (Salcido) had no lien upon it, that Mr. Genung was a friend of his, and that a ranch would not stand between him and a friend at any time; and the other conversation, about two years before the trial, in which Salcido said: "If the buyer [seller?] was willing to give possession, he was." This is all the material evidence on the part of appellee, and is not contradicted by appellant in any material point, except that he did not go upon the land as a tenant of Genung, or under the agreement as testified to by Genung, but went there as an employee at one dollar and fifty cents per day for every day that he should be on the place; that Genung had never paid him anything for taking care of the place, and that for the last three years he (Salcido) had kept the place for himself; that before that time he had asked Genung for pay, but since then had not done so, but claimed the place for himself. It was admitted that the improvements on the place were assessed for the years 1890 and 1891 to Genung, and sold in the years 1891 and 1892 for taxes to the territory, and were not redeemed, and a deed made thereof to the territory.

Without considering at length the questions involved in the fact that the land in controversy is school land, or any other kind of public land, to which propositions appellant has directed the strength of his argument, we do not perceive how Genung could have any standing as a party to this action, after he had given his testimony at the trial. He swore that he had sold the land in question to Mr. Goldman a little more than a year before the trial, and several months before beginning this action; and the record nowhere discloses the fact of a retransfer of the property to him, or that any right to

its possession was in him at any time after his transfer to Goldman. "The privity of estate upon which the plaintiff relies for a recovery is destroyed by showing that he has conveyed his estate, or that it has been extinguished in any other mode." *Holden v. Andrews*, 38 Cal. 119. We think this fact is decisive of the case, and that judgment should have been rendered for defendant upon the evidence adduced at the trial by the appellee or plaintiff. The judgment of the lower court is reversed, and the case remanded, with direction to the lower court to enter judgment for the defendant, with his costs.

Rouse, J., concurs.

HAWKINS, J.—I concur in the reversal.

[Civil No. 470. Filed January 23, 1896.]

[44 Pac. 299.]

J. A. McRAE, Plaintiff and Appellant, v. THE COUNTY
OF COCHISE, Defendant and Appellee.

1. CONSTITUTIONAL LAW—COUNTIES—REWARDS — LIMIT UPON INDEBTEDNESS—LAWS OF ARIZ. 1889, ACT NO. 18, APPROVED MARCH 19, 1889 —HARRISON ACT, 1ST SUPP. REV. STATS. U. S., P. 503, SECS. 4, 7 (ORGANIC LAW ARIZ., REV. STATS. 1901, PAR. 63)—VALIDITY.—Act No. 18, *supra*, provides that the boards of supervisors of the various counties are required to offer a reward of not to exceed three thousand dollars to any person or persons who shall be first in obtaining an artesian well in the county, conforming to the specifications of the act; that after completion of the well, upon notice to the board, the board shall examine the well, and if satisfied that the requirements of the act have been met, shall draw a warrant on the treasurer for the amount of the reward; that all expenses incurred shall be a charge against the county. The fourth section of the Harrison Act, *supra*, provides that no county in any territory shall ever become indebted in any manner or for any purpose to any amount in the aggregate, including existing indebtedness, exceeding four per cent of the value of the taxable property within such county; and all bonds or obligations in excess of such amount given by such corporation shall be void, etc. Section 7 of the Harrison Act is as fol-

laws: "That all acts and parts of acts hereafter passed by any territorial legislature in conflict with the provisions of this act shall be null and void." No judgment can be rendered for plaintiff in an action upon an account presented by plaintiff against the county of Cochise for a reward offered under the provisions of act No. 18, *supra*, the act being void, as creating an obligation prohibited by the Harrison Act, *supra*, it appearing from the record that the county of Cochise was indebted in an amount in excess of four per cent on all the taxable property in the county.

BAKER, C. J., concurs upon this ground alone.

2. HARRISON ACT—"OBLIGATION"—DEFINED.—"Obligation" is defined to be "a tie which binds us to pay or do something agreeably to the laws and customs of the country in which the obligation is made."
3. EVIDENCE—PRESUMPTIONS—MONEY IN TREASURY TO MEET INDEBTEDNESS.—It is not to be presumed that there was money in the county treasury with which the indebtedness of a county could be discharged where the evidence discloses that the county is at the time heavily indebted.
4. CONSTITUTIONAL LAW—REV. STATS. U. S., SEC. 1851, ORGANIC LAW ARIZ., REV. STATS. ARIZ. 1901, PAR. 15—"RIGHTFUL SUBJECT OF LEGISLATION" CONSTRUED—PUBLIC USE—LAWS ARIZ. 1889, ACT NO. 18, APPROVED MARCH 19, 1889—VALIDITY.—Section 1851, *supra*, provides: "The legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States." The phrase "rightful subject of legislation," used in said act of Congress, must be construed to mean the same thing as the phrase "public use." Act No. 18, *supra*, not being a law for a public use, is void.
5. SAME—HARRISON ACT, 1ST SUPP. REV. STATS. U. S., P. 503, SEC. 1, BEING PAR. 63 ORGANIC LAW, REV. STATS. 1901—COUNTIES—REWARDS—LAWS ARIZ. 1889, ACT NO. 18, APPROVED MARCH 19, 1889—SPECIAL LAW—VALIDITY.—Section one of the Harrison Act, *supra*, contains the following: "That the legislature of the territories of the United States . . . shall not pass local or special laws in any of the following enumerated cases; that is to say: . . . Granting to any corporation, association, or individual any . . . privilege, immunity, or franchise whatever. . . ." Act No. 18, *supra*, providing for the payment of a reward by the county to the first one obtaining a flowing well, is void as a special act in conflict with section 1 of the Harrison Act.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Cochise. Joseph D. Bethune, Judge. Affirmed.

The facts are stated in the opinion.

its possession was in him at any time after his transfer to Goldman. "The privity of estate upon which the plaintiff relies for a recovery is destroyed by showing that he has conveyed his estate, or that it has been extinguished in any other mode." *Holden v. Andrews*, 38 Cal. 119. We think this fact is decisive of the case, and that judgment should have been rendered for defendant upon the evidence adduced at the trial by the appellee or plaintiff. The judgment of the lower court is reversed, and the case remanded, with direction to the lower court to enter judgment for the defendant, with his costs.

Rouse, J., concurs.

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lows: "That all acts and parts of acts hereafter passed by any territorial legislature in conflict with the provisions of this act shall be null and void." No judgment can be rendered for plaintiff in an action upon an account presented by plaintiff against the county of Cochise for a reward offered under the provisions of act No. 18, *supra*, the act being void, as creating an obligation prohibited by the Harrison Act, *supra*, it appearing from the record that the county of Cochise was indebted in an amount in excess of four per cent on all the taxable property in the county.

BAKER, C. J., concurs upon this ground alone.

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APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Cochise. Joseph D. Bethune, Judge. Affirmed.

The facts are stated in the opinion.

Barnes & Martin, for Appellant.

The law is general in terms; it applies to all counties; authorizes and requires the offer of a reward to whoever shall first obtain a flowing stream.

The Harrison Act prohibits the passing of "local or special laws." But this is not a local or special law. Any individual in any county may avail himself of the provisions of the act, and each county is required to offer the reward.

It is also urged that the county cannot pay the reward because the county is in debt in excess of four per centum of the taxable property. The act requires the county to make this offer, and to do so as required by the law is not the creation of a debt by act of the county.

The Harrison Act does not prohibit the legislature from imposing a debt upon the county.

No question is raised by the answer or by the stipulation but that the money to pay this reward is in the treasury. The presumption is that it is there. To claim that this is a debt prohibited by this legislation is to claim too much.

It was intended that the counties, after reaching a limit of four per centum, should "pay as you go"; that is all. So here the statute requires the counties to offer a reward for the sinking of artesian wells; the county does so. Appellant avails himself of that offer, and demands his money. The county can pay, and should pay, out of the funds in the treasury, out of the tax levy. This does not violate this limitation of the law.

It was held in *Bank for Savings v. Grace*, 102 N. Y. 313, 7 N. E. 162, that "The indebtedness referred to in the constitution [same as this act] is an indebtedness to be met in the future by taxation." *Dillon on Municipal Corporations*, sec. 136.

See *Jacksonville Ry. Co. v. City*, 114 Ill. 562, 2 N. E. 478; *East St. Louis v. East St. Louis etc. Coke Co.*, 98 Ill. 415, 38 Am. Rep. 97; *Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416; *Appeal of City of Erie*, 91 Pa. St. 398; *Grant v. Davenport*, 36 Iowa, 396.

George W. Swain, District Attorney, for Appellee.

Examination shows that every authority cited by appellant relates to matters and things which were deemed to be neces-

sary to carry on the government. An artesian well is not a necessity. Even if it were, the weight of authority is against the expenditure for necessities in excess of the inhibition. *French v. Burlington*, 42 Iowa, 614; *Hebard v. Ashland*, 55 Wis. 145, 12 N. W. 437; *People v. Johnson*, 6 Cal. 499; *State v. Atlantic City*, 17 Am. & Eng. Corp. Cases, 592; *Prince v. Quincy*, 105 Ill. 138, 44 Am. Rep. 785.

Yet the authorities recognize the distinction between necessary and unnecessary expenses: "Power to provide for the expenses attendant upon the maintenance of municipal government is necessary to preserve its existence." *Law v. People*, 87 Ill. 385.

Section 4 of the Harrison Act is a prohibitive law which prohibits. *Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. Rep. 820.

If the board had issued the written obligation of the county in payment of this claim, and those obligations passed to others, they would have been void. *Buchanan v. Litchfield*, 102 U. S. 278; *Louisiana v. Wood*, 102 U. S. 294.

ROUSE, J.—This is an action upon an account rejected by the board of supervisors of Cochise County, presented by J. A. McRae against the county of Cochise for two thousand dollars, as a reward to him for obtaining the first flowing well in said county. It appears from the record that the board of supervisors offered a reward of two thousand dollars, and McRae had obtained the first flowing well in said county, and that he was, under the facts in the case, entitled to said reward, provided the act of the legislative assembly, approved March 19, 1889, (Laws 1889; p. 35,) is not in conflict with the act of Congress of 1886, commonly called the "Harrison Act." It is shown by the record that the county of Cochise was indebted in an amount greatly in excess of the sum of four per centum on all the taxable property in the county. The fourth section of the said Harrison Act is as follows: "That no political or municipal corporation, county, or other subdivision in any of the territories of the United States shall ever become indebted in any manner or for any purpose to any amount in the aggregate, including existing indebtedness, exceeding four per centum of the value of the taxable property, within such corporation, county, or subdivision; and

all bonds or obligations in excess of such amount given by such corporation shall be void. That nothing in this act contained shall be so construed as to affect the validity of any act of any territorial legislature heretofore enacted, or any of the obligations existing or contracted thereunder, nor to preclude the issuing of bonds already contracted for in pursuance of express provisions of law, nor to prevent any territorial legislature from legalizing the acts of any county, municipal corporation, or such subdivision of any territory as to any bonds heretofore issued or contracted to be issued."

Section 7 of said act is as follows: "That all acts and parts of acts hereafter passed by any territorial legislature in conflict with the provisions of this act shall be null and void." The act of the legislative assembly, herein referred to, and on which this action is based, is as follows:—

"Section 1. The boards of supervisors of the various counties are hereby authorized and required to offer as a reward any sum they deem just, not exceeding three thousand dollars, to any person or persons who shall be first in obtaining a flowing stream of not less than seventeen thousand five hundred gallons of water every twenty-four hours for ten days, by means of an artesian well, at any point in their respective counties, not upon a United States military or Indian reservation, railroad lands, or land grants, or within ten miles of any flowing artesian well or one mile from any permanent flowing stream of water.

"Sec. 2. Any person or persons who would avail themselves of the provisions of this act shall, on the completion of said well, give notice of the same to the clerk of the board of supervisors of the county in which said well shall be situated. Upon receipt of said notice the board of supervisors shall immediately cause due examination to be made of said well, and if satisfied that the requirements of the first section of this act have been complied with, they shall draw their warrant on the county treasurer in favor of the person or persons so obtaining flowing water for the sum to which he or they shall be entitled to under the provisions of this act.

"Sec. 3. All expenses by any board of supervisors under the provisions of this act shall be chargeable to the county, and shall be audited and paid by the board as other claims against the county.

"Sec. 4. This act shall take effect and be in force from and after its passage.

"Approved March 19, 1889."

It will be observed that by said act of Congress it is provided that no county shall ever become indebted to any amount, in the aggregate, including existing indebtedness, exceeding four per centum on the value of the taxable property, and, further, that said act makes all bonds or obligations in excess of such amount void. The inhibition in said act is not limited to indebtedness represented by "bonds," but includes "obligations." The indebtedness of the county of Cochise is admitted to have been, at the time this demand was presented, in excess of the limit of four per centum on the taxable property in said county. Therefore, if the reward sued for was an amount which can be properly designated as a debt or an obligation, it is void, and no judgment therefor could be rendered. The word "obligation" is defined to be "a tie which binds us to pay or do something agreeably to the laws and customs of the country in which the obligation is made." A county cannot become indebted, or create an obligation, in any way, excepting in the manner prescribed by law. Said act of Congress is an inhibition against the enactment of a law by the legislative assembly which would permit a county to become obligated for any sum in excess of the limit fixed. It will be observed that the said act of the legislative assembly does not stop with the grant of power to offer a reward for an artesian well, but is mandatory, and requires the boards of supervisors to offer a reward. The boards of supervisors only have the privilege to fix the amount, not to exceed a certain sum. It will further be observed that the amount offered, together with the expenses of taking the proof of the compliance with the terms of the law by the claimant of the reward, is made an obligation, to be paid by the treasurer of the county on a warrant drawn for said reward and the costs. The act itself makes the reward a debt. It is urged by counsel for appellant that, inasmuch as there is no evidence as to how much money was in the treasury of Cochise County at the time this demand was presented, it should be presumed that there was money therein sufficient to meet the said demand. We think that position is erroneous. The evidence discloses the fact that the county was at that time heavily

indebted. It is not to be presumed that there was money in the treasury with which the indebtedness of the county could be discharged. It is not the policy of a state to levy taxes, and draw from the pockets of the people, to be hoarded, the money which should be kept in circulation. The policy is, that the tax is for the purpose of securing revenue sufficient to meet the expenses of the government for a stated period, usually one year, and that the "tax ought to be so contrived as to take out and to keep out of the pockets of the people as little as possible." Cooley on Taxation, p. 8.

Holding, as we do, that the said act of the legislative assembly is void for the reason that it is in conflict with the fourth section of said act of Congress, we further hold that it is void for the reason that it is in conflict with other acts of Congress which are parts of the organic act of this territory. Section 1851 of the Revised Statutes of the United States is a part of said organic act, and is as follows: "The legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States. . . ." The power of territorial legislatures is further limited by the act of Congress commonly called the "Harrison Act." The first section thereof contains the following: "That the legislatures of the territories of the United States . . . shall not pass local or special laws in any of the following enumerated cases, that is to say: . . . Granting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise whatever, . . . " The act of the legislative assembly under consideration requires the board of supervisors of all the counties to offer a reward, which shall be paid to the person who shall be first in obtaining a flowing well. By said act there can be but one such reward paid in each of the counties of the territory. When one such well is obtained in a county, and the reward is paid, as to that county said act is no longer in existence. It follows from what has been stated that the reward would be a special privilege, granted to the person who obtained the first artesian well in a county, and others who thereafter should obtain such wells could not receive a reward. It will be observed, also, that such well, notwithstanding the payment of the reward, would remain the private property of the owner, in which the county or

the public would have no property right or personal interest, notwithstanding the fact that the public had been compelled to pay for the same. "Taxes are the enforced proportional contributions from persons and property, levied by the states . . . for the support of government, and all public needs." Cooley on Taxation, c. 1; *Perry v. Washburn*, 20 Cal. 318. Having no particular clause of the constitution of the United States by which the expression "rightful subjects of legislation" can be defined, we are forced to determine its meaning by the language employed in connection therewith, and by the laws on the same subject, both state and national, organic and statutory, existing at that time. Said act is a limitation on the power of the territorial legislatures. Their powers are limited thereby to the subjects which are properly included in said phrase, "rightful subjects of legislation." The constitution of each state of the Union limits the powers of the legislatures thereof. The powers of the legislature of one state may differ materially from the powers granted in another, but in all will be found an inhibition against the enactment of laws which are not for a public use. Laws to preserve the public order, to provide for the enforcement of civil rights and the punishment of crime, to make compensation to public officers and to others who perform services for the public, to protect public property, to erect and keep in repair the necessary public buildings,—all these are laws for public use. We think the phrase "rightful subject of legislation," used in said act of Congress, must be construed to mean the same thing as the phrase "public use." The legislative act under consideration is not a law for a public use. It requires the board of supervisors of each county to offer a reward, not to exceed three thousand dollars, to be paid to the person who shall be first in obtaining an artesian well in said county. It provides for but one such well in a county. Such well remains the private property of the person who obtains it, in which the public has no property interest. Said act requires the payment of the public money to the person who obtains such well, without anything being given by him in return. It appears to us that it would not have been more objectionable if the act had expressly provided that a given sum should be paid from the treasury to the appellant. We do not think the act is for a public purpose. It is not for a

purpose for which a tax can be laid. Cooley on Taxation, pp. 55, 103. "To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it on favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called 'taxation.' This is not legislation. It is a decree under legislative form." *Loan Assn. v. Topeka*, 20 Wall. C55.

We think the law is void, also, for the reason that it is a special act, and therefore in conflict with the provisions of the first section of the Harrison Act. In form, it is a general law, in this: that it applies to all the counties. It is general, in this: that the courts would take notice thereof without proof, and without it being pleaded. But, notwithstanding the form and the effect just mentioned, the provisions of the act make it a special act. It provides for a reward for but one flowing well in each county. After one such well is procured, the law is inoperative. It practically ceases to exist. Only one person in a county can receive the reward. It would not have been much more special if it had conferred the privilege to dig an artesian well on some designated person. Legislation is not intended for the present merely. It provides for and anticipates the wants of the future. *Wheeler v. Philadelphia*, 77 Pa. St. 338. In a case in Pennsylvania, in which the validity of a law for the classification of counties was under consideration, it was held that a law providing that "all counties having a population of sixty thousand inhabitants, in which there shall be any city incorporated at the time of the passage of this act with a population exceeding eight thousand inhabitants, situate at a distance from the county seat of more than twenty-seven miles by the usual public traveled road," was unconstitutional for the reason that it was special legislation. *Commonwealth v. Patton*, 88 Pa. St. 258. It was said, in a case in Ohio: "It is true the act in question is in the form, in a sense, of a general law, but the constitutionality of an act is to be determined by its operation, and not by the mere form it may be made to assume." The act under consideration by that court made provisions with reference to cities of the second class, and, further, of cities of that class having a certain population. Columbus was the only city having the enumerated qualifications. The court

said: "The effect of the act would have been precisely the same if the city had been designated by name instead of by the circumlocution employed." And the act was held to be unconstitutional. *State v. Mitchell*, 31 Ohio St. 592. Said act is void for the reason that it is in conflict with the provisions of section 4 of the Harrison Act, in this: that it creates an obligation in excess of four per centum of the taxable property of Cochise County. It is void for the reason that it is not an act on a "rightful subject of legislation." The judgment of the district court is affirmed.

Hawkins, J., concurs.

BAKER, C. J.—I wish to be understood as concurring in the opinion only upon the first point raised,—namely, that the claim presented to the board of supervisors was illegal because the county was already indebted to an amount in the aggregate exceeding four per centum on the value of the taxable property within such county. The act of Congress quoted in the main opinion, and fixing the limit of county indebtedness at four per centum on the value of the taxable property within the limits of the county, is a beneficial law, in view of the past extravagance so manifest in our legislative history, and ought to be strictly enforced. It stands in the place and stead of a constitution to the people of this territory, and is so plainly expressed and worded that there is no room for construction. Its simple reading carries with it a clear understanding of its import and meaning. All questions of policy, all questions of expediency, all questions of local hardships are to be eliminated, for it is to be assumed that all of these things were fully considered and finally determined in enacting the law. Our duty is to support it as it is. We have no just right to add to or take from it one jot or tittle. It is safe to assume, and hold to it, that Congress meant just what it said,—no more, no less. When the constitutional limit has been reached by any county, such county has no further capacity to make contracts out of which additional burdens may arise. This disability extends to all forms of indebtedness, as well as to all purposes. The county is powerless to contract beyond the limit, and the legislature is equally powerless to impose any pecuniary obligation upon the county beyond it. They are both alike confronted by the same disability. It is

claimed that this interpretation will seriously cripple several of the counties in this territory in the administration of their ordinary affairs, since they have already incurred indebtedness up to, and in some instances even beyond, this limit, and must necessarily continue their functions. The answer is obvious. The inhibition is: "Shall ever become indebted in any manner or for any purpose to any amount," etc. If there be such a condition in the financial affairs of any one of the counties, the remedy is with the lawmaking power, not with the courts. The claim presented, being in excess of the limitation fixed, was and is illegal, and that is an all-sufficient reason why it should be rejected.

[Civil No. 342. Filed February 10, 1896.]

[44 Pac. 302.]

SOUTHERN PACIFIC COMPANY, Defendant and Appellant, v. WILLIAM MCGILL, Plaintiff and Appellee.

1. **MASTER AND SERVANT—ASSUMPTION OF RISK.**—A person entering the service of a corporation assumes all risk naturally incident to his employment, including the danger which may arise from the negligence of a fellow-servant.
2. **SAME—INJURY—MASTER'S LIABILITY—FELLOW-SERVANTS—GRADATION IN EMPLOYMENT—PRINCIPAL.**—The master's liability does not depend upon gradations in the employment, unless the superiority of the person causing the injury was such as to make him principal or vice-principal.
3. **SAME—SAME—SAME—SAME — DIFFERENT DEPARTMENTS.**—The liability of the master does not depend upon the fact that the servant injured may be doing work not identical with that of the wrongdoer. The test is, the servant must be employed in different departments which in themselves are so distinct and separate as to preclude the probability of contact and of danger of injury by the negligent performance of the duties of the servant in the other department.
4. **SAME—SAME—SAME—SAME—CONDUCTOR ON WORK-TRAIN — SECTION FOREMAN—COMMON SUPERIOR.**—The conductor of a work-train and a section foreman, both engaged in clearing a piece of track under the direction of a common master, are fellow-servants, and the fore-

man cannot recover of the railroad company for injuries resulting from the negligence of such conductor occurring while carrying the foreman from such place of employment.

BETHUNE, J., and ROUSE, J., concurring specially.

ON REHEARING. For former opinion see 4 Ariz. 116, 33 Pac. 821.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. R. E. Sloan, Judge. Reversed.

Statement of facts:—

The appellee (hereinafter called the "plaintiff") was injured in a collision between a work-train and a regular passenger-train on the railroad of appellant (hereinafter called the "defendant") on August 24, 1890. At the time of the injury the plaintiff was in the employment of the defendant in the capacity of section foreman. His duties were to repair the roadbed, clean up wrecks, and do other similar work under the supervision and control of a roadmaster, from whom he received all orders. Some twelve or thirteen miles of the company's track was allotted to his care in respect to such work. He was directed by the roadmaster to go to a point on the track about six or seven miles west of a section called "Pantano," and within that part of the track allotted to his care in the respect mentioned, and there to grade and lay a track in order to raise an engine which had been derailed and wrecked by reason of a washout. He boarded a work-train used for the purpose, with his gang of men and tools, and went to this point, and was there engaged in the work of raising said engine until about three o'clock in the afternoon of that day, August 24, 1890. The regular passenger-train going east, called "No. 19," was due at this point at about that time, and in order to clear the track for its safe passage the work-train which carried the plaintiff and his men to the point commenced to back up east, towards Pantano, for the purpose of switching. The civil engineer (Lloyd), who, in the absence of the roadmaster (Doyle), was in charge of plaintiff and the men under him, directed plaintiff and his men to get on the work-train. The plaintiff was in the act of doing so. when the conductor of this train came along, and said to the plaintiff: "D—n it, McGill; why don't you get your men on the train. 19 will be on top of us before we

start." Thereupon plaintiff boarded the train, which then commenced to back up at the rate of ten or twelve miles per hour. It had not gone over three quarters of a mile when it collided with the regular passenger-train, called "No. 20," which was proceeding west behind its schedule time. The plaintiff was seriously injured about the head in the collision, and brought this action to recover his damages. The only charge of negligence made in the complaint is the one against Barrett, the conductor of the work-train. It is charged that he ran the train negligently, and with want of care and attention to his duty, and so caused the accident. The jury gave the plaintiff a verdict in the sum of twenty-five thousand dollars. The case was brought to this court on appeal, and the judgment was affirmed upon the plaintiff reducing it to fifteen thousand dollars. *McGill v. Southern Pacific Co.*, 4 Ariz. 116, 33 Pac. 821. The court, however, granted a rehearing in the case, and this decision is made upon such rehearing.

Frank Cox, J. A. Zabriskie, Maxwell & Satterwhite, and W. H. Barnes, for Appellant.

The plaintiff's case was tried upon the lines, and is founded entirely upon the doctrine, laid down in the Ross case; and if the Ross case is overruled or limited to such extent as to change the doctrine, we submit this case must be overruled.

Does the case of *Baltimore etc. R. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. Rep. 914, 37 L. Ed. 772, overrule the Ross case, or limit it to such an extent as to change the doctrine? Judge Field says of the Baugh case in his dissenting opinion, page 410: "The opinion of the majority not only limits and narrows the doctrine of the Ross case, but in effect denies, even with the limitations placed by them upon it, the correctness of its general doctrine, and asserts that the risks which an employee of a company assumes from the service which he undertakes, is from the negligence from one in immediate control as well as from a co-worker, and that there is no superintending agency for which a corporation is liable unless it extend to an entire department of service."

In *Louisville etc. R. R. Co. v. Petty*, 67 Miss. 255, 19 Am. St. Rep. 304, 7 South. 351, the court says: "No rule of the common law is more universally affirmed than the non-lia-

bility of the master to one of its servants for an injury caused by the negligence of a fellow-servant, and it was distinctly announced in this court more than sixteen years ago that all employees of a railroad company engaged in merely operative service are fellow-servants."

In *Knabath v. Oregon Short Line R. R. Co.*, 21 Or. 136, 27 Pac. 91, decided in 1891, the court held: "A section hand riding on a work train from one place to another under the orders of a roadmaster is a fellow-servant of the conductor and engineer."

In *Galveston etc. R. R. Co. v. Smith*, 76 Tex. 611, 18 Am. St. Rep. 78, 13 S. W. 562, it was held that "A roadmaster in charge of a work-train, who had the power to employ and discharge the men on his train, and who moved the train so negligently as to have a collision with another train, in which a section hand who was riding upon the work-train was injured, was a fellow-servant of the section hand, and his negligence could not be considered the negligence of the company." The court said: "It has been held in this state that the negligence of the conductor of the train having control of its operation is not chargeable to the company because he is a fellow-servant of the subordinate operatives. Superiority of work and authority in the service is no test." Citing *Robinson v. Railroad Co.*, 46 Tex. 550.

The cases of *Baltimore etc. R. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. Rep. 914; *Randall v. Baltimore etc. R. R. Co.*, 109 U. S. 478, 3 Sup. Ct. Rep. 322; *Quebec Steamship Co. v. Merchant*, 133 U. S. 375, 10 Sup. Ct. Rep. 397, are decisive of the proposition of McGill and Barrett being fellow-servants within the meaning of the law.

Francis J. Heney, G. C. Israel, and Rochester Ford, for Appellee.

BAKER, C. J. (after stating the facts).—We decline to pass upon the question of the negligence of Barrett, the conductor. The evidence is conflicting in that particular. Besides, that question is not decisive of the case.

The following instruction was given to the jury for plaintiff: "The court instructs the jury that the conductor of a railway train, who commands its movements, directs when

it shall start, at what station it shall stop, and has the general management of it, and control over the persons employed on it, represents the railway company; and is not a fellow-servant with a section foreman in the employ of said company. If the jury believe from the evidence that John Barrett was the conductor of the train upon which plaintiff was, and had the powers just stated regarding such train, the court instructs the jury that Barrett was not a fellow-servant with the plaintiff." This instruction was not altered, changed, or modified by any instruction subsequently given, and, being objected to, and duly assigned as error, constitutes the pivotal point in the case. There is an endless diversity of opinion upon this "fellow-servant" doctrine in the decisions of the various courts in this country. In the states of Massachusetts, Maryland, Maine, Minnesota, Indiana, Iowa, North Carolina, California, Texas, Arkansas, Pennsylvania, Rhode Island, New York, and Wisconsin it is generally held, as between laborers upon a railroad track and the conductor of a train, the relationship of fellow-servants exists. In Missouri, Ohio, Kentucky, and Illinois this doctrine is denied. The cases are too numerous to cite, and it would be an idle effort to attempt to reconcile or distinguish them. I can do no better than to deduce one or two propositions applicable to the facts at bar, which the decided weight of all cases authorizes:—

(1) A person entering the service of a corporation assumes all the risk naturally incident to his employment, including the danger which may arise from the negligence of a fellow-servant;

(2) That the master's liability does not depend upon gradations in the employment, unless the superiority of the person causing the injury was such as to make him principal or vice-principal;

(3) The liability of the master does not depend upon the fact that the servant injured may be doing work not identical with that of the wrong-doer. The test is, the servant must be employed in different departments which in themselves are so distinct and separate as to preclude the probability of contact and of danger of injury by the negligent performance of the duties of the servant in the other department.

In this jurisdiction we are governed by the decisions of the United States supreme court, and this case is to be deter-

mined upon the principles set out in the following cases decided in that tribunal: *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. Rep. 322; *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. Rep. 914; *Railroad Co. v. Hambly*, 154 U. S. 349, 14 Sup. Ct. Rep. 983. In *Randall v. Railroad Co.*, a brakeman was injured by a passing locomotive while working a switch. The court said: "Nor is it necessary, for the purpose of this case, to undertake to lay down a precise and exhaustive definition of the general rule in this respect, or to weigh the conflicting views which have prevailed in the courts of the several states, because persons standing in such a relation to one another as did this plaintiff and the engineman of the other train are fellow-servants, according to the very great preponderance of judicial authority in this country, as well as the uniform course of decisions in the house of lords, and in the English and Irish courts, as clearly shown by the cases cited in the margin. They are employed and paid by the same master. The duties of the two bring them to work at the same place, and at the same time; so that the negligence of the one in doing his work may injure the other in doing his work. Their separate services have an immediate common object,—the moving of the trains. Neither works under the orders or control of the other. Each, by entering into his contract of service, takes the risk of the negligence of the other in performing his service; and neither can maintain an action for an injury caused by such negligence against the corporation, their common master." In *Railroad Co. v. Baugh* the court said: "But this rule [different department rule] can only be fairly applied when the different branches or departments of service are in and of themselves separate and distinct. Thus, between the law department of a railway corporation and the operating department there is a natural and distinct separation; one which makes the two departments like two independent kinds of business, in which the one employer and master is engaged. So, oftentimes therein, in the affairs of such corporation which may be called a manufacturing or a repair department, and another strictly operating department, these two departments are, in their relations to each other, as distinct and separate as though the work of each was carried on by a separate corporation. And from this natural separation flows the rule that he who is

placed in charge of such separate branch of service, who alone superintends and has the control of it, is, as to it, in the place of the master. But this is a very different proposition from that which affirms that each separate piece of work in one of these branches of service is a distinct department, and gives to the individual having control of that piece of work the position of vice-principal or representative of the master." The decision in *Railroad Co. v. Hambly, supra*, is the last utterance of the United States supreme court upon this question. The plaintiff was a common laborer upon a culvert of the company, and while at work was injured by the locomotive of a moving passenger-train on the company's road. The court said: "As a laborer upon a railroad track, either in switching trains or repairing the track, is constantly exposed to the danger of passing trains, and bound to look out for them, any negligence in the management of such trains is a risk which may or should be contemplated by him in entering upon the service of the company. This is probably the most satisfactory test of liability. If the departments of the two servants are so far separated from each other that the possibility of coming in contact, and hence of incurring danger from the negligent performance of the duties of such other department, could not be said to be within the contemplation of the person injured, the doctrine of fellow-servant should not apply." Again, the court said: "Cases arising between persons engaged in the same identical service—as, for instance, between the brakemen of the same train, or two seamen of equal rank in the same ship—are comparatively rare. In a large majority of cases there is some distinction either in respect to grade of service or in the nature of their employments. Courts, however, have been reluctant to recognize these distinctions, unless the superiority of the person causing the injury was such as to put him rather in the category of principal than agent; as, for example, the superintendent of a factory or railway, and the employments were so far different that, although paid by the same master, the two servants were brought no further in contact with each other than as if they had been employed by different principals."

I have quoted extensively from these cases, because their reasoning applies with great force to the facts in hand. But the truth is, every case depends upon its own circumstances.

No hard-and-fast line can be drawn which will suffice for every case. In the case at bar the plaintiff and Barrett, the conductor, were brought together at the same time and place, and closely associated in the discharge of their respective duties. The very work which the plaintiff engaged to do necessitated the constant use of a train, such as the one in use at the time of the collision, to transport laborers, tools, materials, supplies, etc., to the place of operations; and he must be held to have contemplated its use when he accepted the employment. He was at work when riding upon this train in going to and from the point where the wreck occurred, just as much as he was when he was actually engaged in raising the derailed engine. Both he and the conductor were engaged in a common purpose and object,—the clearing of the track and the raising of the fallen engine. The labors of both contributed to and were intended to effect that immediate and present result. Both had a common master. That there was some gradation—some difference in the work of the two—is not the test. The departments must be so distinct and separate within themselves as to preclude the probability of contact and of danger to one servant in one department by reason of the negligence of another servant in another department. This cannot be said of the plaintiff's and Barrett's employment. The plaintiff's labors constantly exposed him to the dangers of running and moving the work-train, and he must be held to have assumed the risk of such dangers. As to who was his immediate superior, the testimony is unclouded. The roadmaster (Doyle), and, in his absence, the civil engineer (Lloyd), stood in such relationship. Barrett, the conductor, had no control over him, and the overtemperate expression attributed to Barrett by the testimony cannot be construed so as to indicate the plaintiff's subordination to him, or otherwise than as a notice to plaintiff of the necessity to act promptly in getting on the train. He had already received orders to board the train from Lloyd. I therefore need not consider the "subordination" idea, since it is not in the case.

It is quite certain that the court, in its former decision in the case (4 Ariz. 116, 33 Pac. 821) erred in applying the *Ross* case (*Railroad Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184) to the facts in this record. In the *Ross* case the engineer of a

freight-train was injured by the joint negligence of the conductor of his own train and that of a gravel-train, with which it collided. In that case the conductor commanded the movements of the train, directed when it was to start, at what stations it should stop, and at what speed it should run, and had the general management of it and control of the persons employed on it. In such case it was held that the conductor represented the company as to the engineer on the train. The evidence in this case is to the effect that the general management of this special train was directly in the hands of Noble, the division superintendent, and not Barrett, the conductor. The telegraph orders of the division superintendent providing for the movements of the train on the day of the accident were very minute and precise. Besides, the plaintiff was not at work upon the train as one engaged in running it, and Barrett had no control over him. The liability of the company in the Ross case was placed upon the ground that the person sustaining the injury was under the direct authority and control of the person by whose negligence it was caused,—an element which is entirely wanting in this case. The facts, therefore, which made the conductor in the Ross case the *alter ego* or vice-principal of the company are not present in this case. It is but just to the court to observe that since the former decision was made the Ross case had been practically limited and narrowed to its own facts by the subsequent case of *Railroad Co. v. Baugh*, *supra*, and it is very probable that if that case and the case of *Railroad Co. v. Hambly*, *supra*, had been announced at the time of the first decision in this case, it would have been substantially as the present one.

The giving of the instructions quoted was reversible error, since, upon the facts, the conductor of the work-train and the plaintiff were fellow-servants. The judgment is reversed and a new trial is ordered.

Hawkins, J., concurs.

BETHUNE, J. (specially concurring).—I concur in the reversal of the judgment of the lower court on the grounds stated in the foregoing opinion, but desire to add that, in addition to the grounds for reversal therein set out, it clearly appears from the record that defendant attempted to prove

that the conductor (Barrett) of the work-train had received such information from the plaintiff himself as to the washed-out and impassable condition of the railroad east of the point at which the repairing of the road was being done immediately before the collision in which plaintiff was injured as to justify him in backing his train, as he did, in that direction, to avoid a collision with the regular train from the west, which attempt on the part of defendant was prevented and refused by the court on the ground that McGill, the plaintiff, was not a source from which the conductor was authorized to receive information which would bind the defendant. While this would undoubtedly be true under ordinary circumstances in cases where the informant is not a party to the suit, in this case the plaintiff is certainly bound by any defect or any conditions in the road or the cars or machinery of which he had knowledge, and certainly of any and all conditions which would render the occupation of himself and co-laborers extraordinarily hazardous. I think the refusal of the court to allow the defendant to prove the declarations of McGill to the conductor, as to what he knew of the condition of the track was an error, for which alone the case should be reversed.

Rouse, J., concurs in the above.

[Civil No. 502. Filed March 9, 1896.]

[44 Pac. 297.]

PIMA COUNTY, Plaintiff and Appellant, v. MANLEY S. SNYDER et al., Defendants and Appellees.

1. OFFICE AND OFFICERS—OFFICIAL BONDS—FAILURE OF PRINCIPAL TO SIGN—SEVERAL BONDS—SURETIES—LIABILITIES—REV. STATS. ARIZ. 1887, PARS. 3078, 3081, CITED AND CONSTRUED.—Paragraph 3078, *supra*, provides that "all official bonds shall be in form joint and several," and paragraph 3081, *supra*, provides that "when the penal sum . . . amounts to more than one thousand dollars, the sureties may become severally liable for portions of not less than five hundred dollars," etc. Where ten sureties have signed an official bond under the provisions of paragraph 3081, *supra*, each becomes severally liable, and in a suit upon such bond, the liability of the prin-

principal being fixed by law, and such principal having entered upon the duties of his office and received the emoluments thereof, and the sureties having signed the bond for the faithful performance of the duties of such office, it would be a good obligation against them, and for any default on his part they should be held, even in the absence of his signature as principal.

2. **SAME—SAME—SAME—REV. STATS. ARIZ. 1887, PAR. 3079, CONSTRUED AND HELD DIRECTORY.**—Paragraph 3079, *supra*, requiring the principal to sign an official bond where his liability is fixed by operation of law, is directory.
3. **SAME—SAME—SIGNATURE OF PRINCIPAL—NAMED IN BOND—SUFFICIENT TO BIND SURETIES.**—Where the complaint shows that the name of the principal appears in the body of an official bond, and the bond is delivered and accepted as his official bond, the same is a valid signing of the bond, notwithstanding the omission of the final signature of such officer.
4. **SAME—SAME—SAME—SIGNATURE TO OATH OF OFFICE—SUFFICIENCY TO BIND SURETIES.**—Where the principal omits to sign his name to an official bond, but accepts the office, and has his bond signed by his sureties, and signs his name to the oath of office annexed to the bond, this is a signing of the bond, and his sureties must be held.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. Joseph D. Bethune, Judge. Reversed.

Statement of facts:—

This is an action upon the official bond of Manley S. Snyder, late tax-collector of Pima County, and his sureties. Manley S. Snyder, the principal on the face of the bond, purports to be bound in the sum of twenty-five thousand dollars, and each of the ten sureties in the sum of five thousand dollars respectively. After setting out the several amounts for which the principal and sureties severally bound themselves, these words follow: "For the payment of which well and truly to be made, we bind ourselves, our heirs, executors, and administrators, firmly by these presents." The conditions of the obligations are then set out in the bond in the usual form,—to the effect that the said Snyder was elected to the office of tax-collector, and that if he well and truly performed all of the official duties required by law, etc., the obligation should be void; otherwise, to remain in full force and virtue. It is alleged in the complaint that the bond was not signed by the

principal, Snyder, but was duly executed by all of the sureties, and duly delivered to and approved by the chairman of the board of supervisors of Pima County, and filed in the office of the county recorder, as required by law; and it is alleged that Snyder, as such tax-collector, took and subscribed the oath of office attached to and indorsed upon said bond, and entered upon the discharge of the duties of said office, the term of which expired the thirty-first day of December, 1890. It further appears from the copy of the bond set out in the complaint that the name of the principal, "Manley S. Snyder," appears in the body of said bond at least three times. It also appears, and it is alleged as a breach of the conditions of said bond, that during his term of office he collected, as tax-collector, \$83,399.67 taxes, and paid over to the treasurer of the county only \$79,529.67 thereof, leaving \$4,070 wholly unaccounted for, and which was converted unlawfully to his own use, and was not paid to the county treasurer as required of him by law. This action was brought to recover from his bondsmen that sum. The defendants, the sureties, severally demurred to the complaint, and the demurrers were sustained; and, plaintiff refusing to amend, judgment was rendered for defendants, and appellant has brought this appeal, and assigns as errors (1) that the court erred in sustaining said demurrers and rendering judgment for defendants; and (2) in holding that no recovery could be had against defendants, the sureties upon the said bond.

William M. Lovell, District Attorney, for Appellant.

In the case of *People v. Hartley*, 21 Cal. 385, the supreme court of that state held that the sureties on a bond similar to the one here under consideration were not liable. But it must be remembered that the California statute did not contain the exception contained in paragraph 3078 of our statute.

The supreme court of Wisconsin, in the case of *Douglas County v. Brandon*, 79 Wis. 614, 48 N. W. 969, held that the sureties were liable on such a bond.

In the case of *Cockrill v. Davie*, 14 Mont. 131, 35 Pac. 958, the supreme court of Montana held that where the liability of a principal in a bond is fixed by contract or operation of law, his failure to sign the bond does not affect the liability of the

sureties thereon. "The fact that such treasurer did not sign the bond did not exonerate the sureties on such bond from liability thereon, he having subscribed his oath of office on the back of such bond." *Hall v. State*, 69 Miss. 529, 13 South. 38.

Where an officer writes his name in the body of an instrument which is delivered and accepted as his official bond, the same is valid as such, notwithstanding the omission of his final signature." *McLeod v. State*, 69 Miss. 221, 13 South. 268.

"The failure of the principal to sign a bond, as he had promised his sureties he would do, before delivering the bond to the obligee, will not make the delivery to him a conditional one, and the sureties are liable." *School Trustees v. Sheik*, 119 Ill. 579, 57 Am. Rep. 830, 8 N. E. 189. See, also, *State v. Bowman*, 10 Ohio, 445, and *United States, v. Line*, 13 Pet. 290.

Charles Weston Wright, for Appellees.

HAWKINS, J. (after stating facts).—About the only question in this case is, Did the court below err in holding that, because the name of Snyder was not signed to said bond, the sureties were not bound thereon? Paragraph 3078 of the Revised Statutes provides that "all official bonds shall be in form joint and several, except as hereinafter provided, and payable to the territory of Arizona." Paragraph 3079 of the Revised Statutes: ". . . Such bond must be signed by the principal and at least two sureties." The penal sum of the bond in this action is twenty-five thousand dollars. Paragraph 2665 of the Revised Statutes: "Before entering upon his duties, the tax-collector shall execute to the territory of Arizona a bond in such penal sum as the board of supervisors of the county may require, with two or more sufficient sureties to be approved by said board, and conditioned that he shall faithfully perform all the duties of his office as required by law. . . ." It is presumed that under this paragraph the amount of the penalty of the bond was required at twenty-five thousand dollars. This, upon such tax-collector entering upon the duties of his office, fixed his liability; and paragraph 3081 of the Revised Statutes provides: "When the penal sum of any bond required to be given amounts to more than one thousand dollars, the sureties may become sev-

erally liable for portions of not less than five hundred dollars thereof, making in the aggregate at least two sureties for the whole penal sum. And if any such bond becomes forfeited an action may be brought thereon against all or any of the obligors, and judgment entered against them, either jointly or severally, as they may be liable. . . ."

The ten sureties signing the bond for five thousand dollars each made the aggregate of the bond at least two sureties for the whole penal sum, and became severally liable, under paragraph 3081, just given, for five thousand dollars each. Hence, under the instrument sued on, the liability of the principal being fixed by law, and such principal having entered upon the duties of the office and received the emoluments thereof, and the sureties having signed the bond for the faithful performance of the duties of such office, it would be a good obligation against them, and for any default upon his part they should be held. See *Cockrill v. Davie*, 14 Mont. 131, 35 Pac. 958, wherein Mr. Justice Harwood says, "As to such obligations, where the liability of the principal is fixed by contract, or by operation of law, the sureties who guaranty the fulfillment of that obligation cannot avoid their obligation because the principal did not sign the bond with them." If the sureties had lost any legal right because of the principal's failure to sign his name to the bond, then there might have been some reason for the demurrer to have been sustained. The principal's liability was fixed by operation of law, and the sureties severally obligated themselves in the sum of five thousand dollars that said principal would perform the covenants set out in such bond. He could be made a party to the suit; a recovery could be had against him; so we cannot see how this case could fall within that class of actions where the liability of both principal and sureties arise from, or is founded upon, the instrument alone. The case of *People v. Hartley*, 21 Cal. 585, 82 Am. Dec. 758, so strongly relied upon by appellee, is held to be a joint bond, and the signature of the principal therefore essential to the validity and binding force upon the sureties. Our statute (Rev. Stats., par. 3078) is different from that of the Political Code of California (sec. 958). Paragraph 3081, *supra*, expressly provides that "an action may be brought thereon against all or any of the obligors, and judgment en-

tered against them, either jointly or severally; . . ." thus clearly making the bond in this case a several obligation. Paragraph 3079 of the Revised Statutes, requiring the principal to sign the bond where his liability is fixed by operation of law, is directory.

The complaint also shows that the name of the principal appears in the body of the bond. If an officer writes his name in the body of the bond, which is delivered and accepted as his official bond, the same is a valid signing of the bond, notwithstanding the omission of final signature of such officer. *McLeod v. State*, 69 Miss. 221, 13 South. 268; *State v. Bowman*, 10 Ohio, 445. In *State v. Bowman*, *supra*, it is distinctly held by the supreme court of Ohio that when in a county treasurer's bond the name of the treasurer was recited as principal, but he neither signed nor sealed the bond, it was a good common-law bond, and that the sureties were liable. This is upon the doctrine that a contract signed and entered into for a lawful purpose, and founded upon sufficient consideration, is a valid contract at common law. *United States v. Linn*, 15 Pet. 290.

It is further alleged in the complaint that the principal took and subscribed the oath of office attached to and indorsed upon said bond, and afterwards entered upon the duties of said office. Where the principal omits to sign his name to a bond, but accepts the office, and has his bond signed by his sureties, and signs his name to the oath of office annexed to the bond, this is a signing of the bond, and the sureties must be held. *Hall v. State*, 69 Miss. 529, 13 South. 38.

Under any view of the case as stated we are of the opinion that the complaint states a good cause of action. The only proper construction of the language of the bond sued on in this case, in connection with paragraphs 3078 and 3081 of the Revised Statutes, is, that each of the sureties is bound and intended to bind himself severally; and if the facts of the complaint are true, which the demurrers admit, they are severally liable. Judgment reversed, with direction to the court below to overrule the demurrer.

Baker, C. J., and Rouse, J., concur.

[Civil No. 482. Filed May 4, 1896.]

[44 Pac. 1088.]

T. D. MCGLASSEN et al., Defendants and Appellants, v.
D. A. TYRRELL, Plaintiff and Appellee.

1. **NEGOTIABLE INSTRUMENTS—PRINCIPAL AND AGENT—ACCEPTANCE OF ADVANCE INTEREST PAID BY PRINCIPAL—RELEASE OF SURETY—RECEIPT OF INTEREST BY AGENT OF PAYEE—RATIFICATION.**—The payee of a note does not by receiving advance interest paid to his agent, who was not authorized to receive any advance interest, ratify the unauthorized act of his agent so as to release a surety upon the note, unless he had full knowledge when he received the interest that it had been paid to such agent before it was due.
2. **SAME—ADVANCE INTEREST—RELEASE OF SURETY.**—While the acceptance of interest in advance from the principal on an overdue note may operate as an extension of the time of payment, and thus release the surety, it is not conclusive.
3. **SAME—PRINCIPAL OR SURETY—EVIDENCE—ONE TO WHOM CREDIT GIVEN PRINCIPAL.**—Evidence that McGlassen went to borrow three hundred dollars, but that the lender only agreed to make the loan if Chandler would sign the note, is sufficient evidence to authorize a judgment against Chandler as the real party in interest, to whom the credit was given.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge. Affirmed.

The facts are stated in the opinion.

John D. Pope, for Appellants.

Receiving a payment of interest in advance from the principal of a past-due promissory note, without the knowledge or consent of the surety, and without any express agreement as to the effect of the payment, operates in law as an extension of the note until the expiration of the time for which the interest is paid. 2 Brandt on Suretyship, sec. 352; *Crosby v. Wyatt*, 10 N. H. 322; *Woodburn v. Carter*, 50 Ind. 376; *Scott v. Saffold*, 37 Ga. 384; *Robinson v. Miller*, 2 Bush, 176; *Wakefield v. Truesdale*, 55 Barb. 602; *Hollingsworth v. Tomlinson*, 108 N. C. 245; *Blayer v. Bundy*, 15 Ohio St. 57; *Grayson's Appeal*, 108 Pa. St. 581.

It was not necessary that plaintiff should have given his agent authority in advance to receive the interest before it was due. Accepting the interest from his agent was a ratification of the agent's act, and had the same effect as if he had authorized it beforehand; especially as plaintiff does not claim that he accepted the money in ignorance of any fact, or that he ever offered to rescind the act of ratification. His knowledge will be presumed, and the act of the agent binds him. *Blen v. B. R. and A. W. and M. Co.*, 20 Cal. 602, 81 Am. Dec. 132; *Kearns v. Olney*, 80 Cal. 100, 13 Am. St. Rep. 101, 22 Pac. 57; *Mitchell v. Finnell*, 101 Cal. 614, 36 Pac. 123; *Pennsylvania etc. R. Co. v. Bridge Co.*, 131 U. S. 371, 9 Sup. Ct. Rep. 770.

Cox & Street, and Millay & Bennett, for Appellee.

The unauthorized act of the agent in receiving the interest on the overdue note before the interest was due could not be imputed to the principal, and the principal (the plaintiff) could not by receiving the interest from the agent ratify the unauthorized act of the agent, Hickey, unless he had full knowledge at the time that he received it that the interest had been paid to his agent, Hickey, before it was due. See *Owings v. Hull*, 9 Pet. 607, where the court says: "No doctrine is better settled than this: That the ratification of an act of an agent, previously unauthorized, must, in order to bind the principal, be with full knowledge of all material facts. If the material facts be either suppressed or unknown, the ratification is treated as invalid because founded in mistake and fraud." See, also, *Coal Co. v. Coal and Iron Co.*, 16 Md. 546, 77 Am. Dec. 311; *Bryant v. Moore*, 26 Me. 84, 45 Am. Dec. 96; *Billings v. Morrow*, 7 Cal. 171, 68 Am. Dec. 235; *Karns v. Olney*, 80 Cal. 100; *Puget Sound L. Co. v. King*, 89 Cal. 237; *McClelland v. Whiteley*, 15 Fed. 322; Story on Agency, secs. 239, 242.

The receipt of interest in advance is not of itself sufficient evidence of a promise to extend the payment so as to release the surety. *Spigg v. Bank*, 10 Pet. 255; *Spigg v. Bank*, 14 Pet. 201; *Bank v. Gardner*, 57 Mo. App. 268; *Haydenville Bank v. Parsons*, 138 Mass. 53; *Hosea v. Rowley*, 57 Mo. App. 357; *Bank v. Lewis*, 8 Pick. 457, 19 Am. Dec. 343; *Bank v.*

Bishop, 6 Gray, 317; *Russell v. Brown*, 21 Mo. 51; *Bank v. Morrison*, 38 Mo. App. 485; *Bank v. Rollins*, 13 Mo. 202; *Bank v. Abbott*, 28 Me. 280; *Williams v. Smith*, 48 Me. 135; *Crosby v. Wyatt*, 23 Me. 156; *Bank v. Hill*, 10 Pick. 129; *Hansbergers v. Kinney*, 13 Gratt. 511.

HAWKINS, J.—Action on a promissory note for three hundred dollars, given on October 26, 1889, by McGlassen & Chandler to Tyrrell, interest payable quarterly. The loan was made through Hickey, agent for Tyrrell, who knew the loan was for the benefit of McGlassen, and that Chandler signed the note as surety for McGlassen. Quarterly payments of interest were made on said note as follows: February 24, 1894, \$13.50; April 3, 1890, \$13.50; August 29, 1890, \$13.50. The second quarterly payment of interest was not due until April 26, 1890, and hence was paid twenty-three days in advance of the time it was actually due. The evidence shows that at the time Hickey made the loan to McGlassen he declined to do so until McGlassen offered Chandler's name on the note with his own. The payment of this interest was made by McGlassen to the agent, Hickey, nothing being said at the time about an extension of the note. Chandler did not know that this payment had been made in advance. Chandler, in his answer, pleaded that he was surety only, and that the plaintiff, for a consideration,—viz., the payment of such interest in advance,—had extended the time of the note without his knowledge or consent, thus releasing him. The court below gave judgment for the plaintiff against both McGlassen and Chandler. A motion was made for a new trial, which was denied, and Chandler appeals. Appellants specify the following as errors committed by the court below: (1) The court below erred in holding and deciding that the receipt of interest in advance by plaintiff, without the knowledge of appellant, did not operate as a release of the appellant; (2) the court erred in giving judgment for the plaintiff against the appellant; (3) the court erred in refusing appellant's motion for a new trial.

An examination of the record shows that the court below permitted all the witnesses to testify that Chandler signed the note as surety; and it does not appear in the record that the court held, as a matter of law, that the payment of the second

installment of interest in advance by McGlassen to Hickey, and its receipt by Tyrrell, would not release Chandler, the surety. It seems that the court was warranted in holding, from the evidence in this case, that, the payment having been made by McGlassen to Hickey without the knowledge either of Chandler or Tyrrell, the acceptance of the interest by Tyrrell did not release the surety, especially as Tyrrell testifies that Hickey was not authorized to accept interest in advance and thereby release the surety. The principal could not, by receiving the interest from the agent, ratify the unauthorized act of said agent, Hickey, unless he had full knowledge when he received the interest that it had been paid to said agent before it was due. "No doctrine is better settled, both upon principle and authority, than this: That the ratification of an act of an agent, previously unauthorized, must, in order to bind the principal, be with full knowledge of all the material facts." *Owings v. Hull*, 9 Pet. 607. In the case of *Hoffman Steam-Coal Co. v. Cumberland Coal etc. Co.*, 77 Am. Dec. 311, Mr. Chief Justice Le Grand, in speaking for the supreme court of Maryland, uses the following language: "The law governing questions of ratification, in cases like the present, is well settled. To render the act of ratification effective and conclusive, certain considerations are necessary. At the time of the supposed ratification, the principal must have been fully aware of every material circumstance of the transaction, . . . and his act of ratification must have been an independent and substantive act, founded on complete information, and of perfect freedom of volition." The following authorities hold the same way: *Story on Agency*, secs. 239, 242; *Bryant v. Moore*, 26 Me. 84, 45 Am. Dec. 96; *Billings v. Morrow*, 7 Cal. 171, 68 Am. Dec. 235; *Karns v. Olney*, 80 Cal. 100, 22 Pac. 57; *Lumber Co. v. Krug*, 89 Cal. 237, 26 Pac. 902; *McClelland v. Whiteley*, 15 Fed. 322; 1 Am. & Eng. Ency. of Law, 431. The evidence in this case would have authorized the court below in holding that Chandler was the real party in interest, to whom the credit was given. It is clearly shown that McGlassen went to Hickey to borrow three hundred dollars; that Hickey, representing Tyrrell in making the loan, agreed to make the loan if Chandler would sign the note. While the acceptance of interest in advance from the principal on an overdue note may operate as an extension of

the time of payment, and thus release the surety, it is not conclusive. Affirmed.

Rouse, J., and Bethune, J., concur.

[Criminal No. 102. Filed May 7, 1896.]

[44 Pac. 1089.]

ALBINO MARTINEZ, Defendant and Appellant; v. TERRITORY OF ARIZONA, Plaintiff and Respondent.

I. CRIMINAL LAW—INDICTMENT—MATERIAL ALLEGATION—STEER—PROOF—COW—VARIANCE—REV. STATS. ARIZ. 1887, PEN. CODE, PAR. 765, CITED.—In an indictment under the statute, *supra*, making the felonious taking of a cow, steer, etc., grand larceny, charging defendant with the larceny of a steer, the allegation that the animal stolen was a steer is a material allegation, and must be proved as charged. Proof that the animal stolen was a cow is a fatal variance.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. Joseph D. Bethune, Judge. Reversed.

The facts are stated in the opinion.

Barnes & Martin, for Appellant.

Thomas D. Satterwhite, Attorney-General, for Respondent.

HAWKINS, J.—Defendant was indicted for the larceny of a steer, the property of the Empire Land and Cattle Company. He pleaded not guilty. On the trial of the cause, the testimony of witness Turner, the foreman of the cattle company, disclosed that the animal stolen was a spayed cow. The statute (Pen. Code, par. 765) makes the "felonious taking of . . . cow, steer, bull, calf, . . . or any neat or horned cattle, grand larceny, without regard to the value." A "steer" is defined to be a "young male of the ox kind, or common ox; especially a castrated taurine male, from two to four years old." Webster. Defendant moved the court to strike out all of witness Turner's evidence relating to such cow, on the ground that the indictment charged the larceny of

a steer. The court overruled the motion, and, on the case going to the jury, the defendant asked the court to give the following instructions: "(2) You are also instructed that one of the material allegations of the indictment is that the animal alleged to have been stolen was a steer, and such fact must be proven to your satisfaction beyond a reasonable doubt, or you must acquit the defendant. (3) You are further instructed that, if you find from the evidence before you in this case that the animal alleged to have been stolen was a spayed cow, you must acquit the defendant." The court erred in refusing to grant said motion, as well as in refusing to give said instructions. The allegation that the animal stolen was a steer is, under the statute, a material allegation, and must be proved as charged in the indictment. This is not a new question. The statute of this territory is similar to that of Texas before the Texas statute was amended. The supreme court of Texas has decided again and again that it is a variance to allege one kind of animal and prove another. *Banks v. State*, 28 Tex. 645; *Jordt v. State*, 31 Tex. 571, 98 Am. Dec. 550; *Swindel v. State*, 32 Tex. 103; *Gibbs v. State*, 34 Tex. 135; *Keese v. State*, 1 Tex. App. 298; *Persons v. State*, 3 Tex. App. 241; *Brisco v. State*, 4 Tex. App. 219, 30 Am. Rep. 162; *Allen v. State*, 8 Tex. App. 360. Montana has also followed the above decisions. *State v. McDonald*, 10 Mont. 21, 24 Am. St. Rep. 25, 24 Pac. 628. We do not deem it necessary to examine the record further in said action. The judgment is reversed.

Baker, C. J., and Rouse, J., concur.

[Civil No. 337. Filed June 22, 1896.]

[45 Pac. 341.]

FREDERICK W. SMITH et al., Defendants and Appellants,
v. UNITED STATES OF AMERICA, Plaintiff and Appellee.

1. OFFICE AND OFFICERS—RECEIVER OF LAND OFFICE—BOND—RULINGS OF INTERIOR DEPARTMENT—NOT PART OF—CHANGE OF RULING—SURETIES—RELEASE OF.—It appears from the evidence that money misappropriated by the receiver of public moneys in the Tucson

Land District was received by him for the sale of public lands, and for no other purpose. The ruling of the department of the interior in force at the time the defendant's bond was executed was, that payments before entry had been allowed and certificate given simply made the receiver of the land office the agent of the entryman, and were not public moneys. Subsequent thereto, and in view of such misappropriation, it was ruled that the moneys so paid were public moneys, and upon such later ruling the government issued patents to entrymen whose payments were misappropriated. *Held*, the former ruling was no part of the contract between the sureties upon the receiver's bond and the government, and that the moneys being in fact public moneys, a mere change in the ruling of the department as to what were public moneys did not release the sureties from their liability upon his bond.

2. LACHES—NOT ATTRIBUTABLE TO GOVERNMENT.—Laches is not attributable to the government.
3. OFFICES AND OFFICERS—BONDS—STATUTE FIXING AMOUNT—INCREASE BY EXECUTIVE OFFICER—VOLUNTARY BOND—DURESS.—Where the statute requires a bond of ten thousand dollars, a bond increased by the direction of the President of the United States to thirty thousand dollars, and voluntarily given, is not void as to the sureties on the ground of duress.
4. SAME—SAME—REFUSAL TO STOP PAYMENT ON DRAFT IN HANDS OF DEFAULTING OFFICER—RELEASE OF SURETIES.—The refusal of an inspector of the interior department to telegraph to the treasury department to stop payment upon a draft in the hands of a defaulting public officer, when requested by a surety upon such officer's bond so to do, does not prevent the government from recovering the full amount of the bond from such surety.
5. EVIDENCE—UNITED STATES TREASURER'S TRANSCRIPT—REV. STATS. U. S., SEC. 886, CITED.—The treasurer's transcript, duly certified under section 886, *supra*, was properly admitted as evidence of all things therein contained which came within the official knowledge of the accounting officers of the treasury department.

APPEAL from a judgment of the District Court of the First Judicial District. R. E. Sloan, Judge. Affirmed.

The facts are stated in the opinion.

W. H. Barnes, C. F. Ainsworth, and J. M. Martin, for Appellants.

The law and the rules of the department, in accordance with law and authorized by law to be made, are a part of the bond, and are as much a part of the contract as the writing itself.

The alteration of the contract, if the letter "M" is to be treated as making such moneys public moneys, changes the very nature of the contract, and was void as against the sureties. *United States v. De Viser*, 10 Fed. 642.

This was a bond for thirty thousand dollars, not required by any statute. It was demanded and required of Smith by executive order, and was extorted from him under duress, and as a condition upon which he should continue to hold the office. And hence the bond is void.

It was held in *Tingley v. United States*, 5 Pet. 115, that if a bond was demanded of the party under peril of losing his office, it was extorted under color of office against the requisites of the statute. It was plainly, then, an illegal bond, for no officer of the government has a right under color of his office to require from any subordinate officer as a condition for holding office that which is not required by law. That would be not to execute, but to supersede, the requisites of the law. *United States v. Humason*, 6 Saw. 199, Fed. Cas. No. 15,421; Murfree on Official Bonds, sec. 39; *United States v. Bradley*, 10 Pet. 343; *United States v. Lynn*, 15 Pet. 290. See, particularly, *State v. Finley*, 10 Ohio, 51.

Where a party has it in his power to prevent loss or injury to bondsmen or sureties of contracting parties, it is his duty to prevent it, and where the party has the means of satisfaction in his hands and does not choose to retain it, but suffers it to pass into the hands of the principal, the surety is discharged; and we contend that that rule applies to the government as well as to individuals. *Bellus v. Vanderslice*, 8 Serg. & R. 454; *Neff's Appeal*, 9 Watts & S. 36; *Taylor v. Lohman*, 74 Ind. 421; *Allen v. McDonnell*, 23 Fed. 573.

E. E. Ellinwood, United States District Attorney, for Appellee.

Sureties are liable for the discharge of the duties of the office by their principal, even where new duties are imposed by subsequent statutes, much less regulations, unless the duties of the office are so changed that the court can fairly call it a different office from that originally undertaken. *United States v. Gaussen*, 2 Wood, 92, Fed. Cas. No. 15,192; *United States v. Gaussen*, 97 U. S. 584.

In the case of *United States v. McCartney*, 1 Fed. 104, this

subject is considered at length, and the numerous authorities are reviewed. In its decision the court quotes the case of *White v. Fox*, 22 Me. 341, wherein it is said: "If the sureties of the official bond of persons holding offices created by law and the duties of which are prescribed by law were to be discharged by every change of the law relating to the duties, it would in these days of over-frequent change, be to little purpose to trouble officers to obtain sureties." *Illinois v. Ridgeway*, 12 Ill. 14; *Smith v. Peoria Co.*, 59 Ill. 412; *People v. Vilas*, 36 N. Y. 459, 93 Am. Dec. 520; *Mayor v. Morgan*, 12 B. Mon. 278; *Marney v. State*, 13 Mo. 7.

Sureties on an official bond are not exonerated by the laches of government agents in calling their principal to account. In the case of *United States v. Kirkpatrick*, 9 Wheat. 720, Justice Story says: "The supposition that laches will discharge the bond cannot be maintained as law. Laches is not imputable to the government, and this maxim is founded not in the notion of extraordinary prerogative, but upon great public policy. The government can transact its business only through its agents; and its fiscal operations are so various, and its agencies so numerous and scattered that the utmost vigilance would not save the public from the most serious losses, if the doctrine of laches can be applied to its transactions."

That the exaction of a larger bond was not extortion, see *United States v. Bradley*, 10 Pet. 343; *United States v. Linn*, 15 Pet. 290; *United States v. Hodson*, 10 Wall. 395.

HAWKINS, J.—This was an action brought against Fred W. Smith and the sureties on his official bond as receiver of public moneys in the Tucson Land District, in this territory, dated the seventh day of March, 1888, for the sum of thirty thousand dollars, the condition of which is, that he "shall, at all times during his holding and remaining in said office, carefully discharge the duties thereof, and faithfully disburse all public moneys, and honestly account, without fraud or delay, for the same, and for all public funds and property which shall or may come into his hands." The government complained in its complaint that the bondsmen were liable for various and sundry sums which came into the hands of said receiver, aggregating over nineteen thousand dollars. At the

time, persons having made entry, and applying for final proof to obtain patents, they each handed to the receiver one dollar per acre, to be applied by him when final proof was passed upon by the government, if the proof was allowed, and to be returned to the entrymen if proof was disallowed. The receiver gave no receipt for the money. This seems to have been prohibited, yet there was also a rule of the department that "proof, without payment, must in no case be accepted." The moneys derived from this source amounted to about forty thousand dollars, in the hands of Smith when he went out of office. Of this money, about twenty-five thousand dollars was by Smith, through defendant Christy, returned to persons who had handed the same to Smith. This state of affairs is said to have been caused for the reason that, at the time so many persons were presenting their proofs and handing in their payments to Receiver Smith, there was no register, or Register Duff was in such ill health as to be unable to attend to the duties of his office. As a consequence, this vast amount of money was paid in to said receiver by persons desiring to enter land at the time of presenting their proof. This was the state of chaos in which Receiver Drake found the office when he took charge as receiver. A large number of persons who had presented proof to, and made payment to, Receiver Smith while in the charge of the said office, finding their proof accepted, made repayment to Receiver Drake. Then there were a number of cases where final proof had been made and presented to Smith while receiver, and in which entrymen, in accordance with regulations, had handed payment to Smith. At the time these cases were reached by the successor in office of Smith, and ready to be passed upon in favor of entrymen, for want of the money the officers of the land office were withholding patents, or final receipts, from the entrymen. This was done by the local land officers for the reason that the rulings of the general land office theretofore were that such payments, made before entry had been allowed and certificate given, simply made the receiver of the land office the agent of the entrymen, and were not public moneys. As stated, a number of persons under this regulation made repayment to Receiver Drake. Others, having made payment once to the agent of the government, and under the rule that "proof, without payment, must in no case be accepted," de-

manded their certificates. The state of affairs being reported to the general land office, Acting Commissioner Stone changed the former rulings of the general land office, as will be seen by the following letter: "Letter 'M.' Department of the Interior, General Land Office. Washington, D. C., April 30, 1890. Register and Receiver, Tucson, Arizona—Sir. I inclose herewith a statement, as taken from the records of your office, showing the final proofs, now in your office awaiting examination, on which the money in payment for the same was paid to Fred W. Smith, the late receiver, and was by him appropriated to his own use, and never accounted for to the United States. You are instructed to examine all the final proofs now in your office, as shown by the accompanying list; and, if the same is found sufficient, you will request the parties in interest to furnish an affidavit, properly attested, showing that they did pay the money to Fred W. Smith, and whether the same was paid by draft or check. If the parties can furnish certified copies of these drafts or checks from the cashier of the bank, showing the same, you will obtain these copies and allow the entries as of date when proof and payment were made. You will refer on the entry papers and upon your records to this letter, by initial and date, as your authority therefor. The receiver will enter upon the books of his office, under the account of Fred W. Smith, late receiver, the amount of purchase money received for each class of entry. You will give to said entries a half number corresponding to the time when said proof was accepted, and prepare supplemental abstracts of the same, noting thereon, 'Allowed by Letter "M" of April 30,' and purchase money is to be charged to Fred W. Smith, the late receiver. You will then prepare an account current form 4-105 thereof, and certify therein that the transaction reported appears from the records of your office. The receiver will send a duplicate receipt to the entrymen in accordance with the instructions herein contained, noting on the receipt, as his authority, this letter, by initial and date; and after you have carefully examined all of these papers, as instructed in this letter, you will forward them to this office for future consideration. The decision of this office heretofore has been against the allowance of an entry, where the money be payable to the receiver of public moneys, if the moneys were not

properly accounted for, or deposited to the credit of the treasurer of the United States. But, as a matter of equity, in view of the general circular of this office, which provides that proof, without payment, must in no case be accepted or received by register and receiver, and in view of the fact that entrymen had made their payments in accordance with this circular issued by this office, it is the opinion of this office that the entries should be allowed. I am aware that the views herein expressed are in conflict with the practice above referred to, but my understanding of the law, and convictions of equity, are so strong and clear that, reluctant as I am to change the former practices, I feel myself compelled to do so in this case. I therefore hold that the moneys paid by entrymen to Fred W. Smith, receiver, and received by him in his official capacity as such, were public moneys, within the meaning and intent of the law, and the payment to him was a payment to the government. The recourse of the United States is under the official bond of Mr. Smith, and, as suit has already been instituted for the recovery of the amount received by him, the entries should be allowed without further delay. Very respectfully, WILLIAM STONE, Assistant Commissioner."

The ruling contained in this letter seems to have been a complete change in the prior decisions and rulings of the department of the interior. See *Matthiessen v. Ward*, 6 L. D. Dep. Int. 714; *Lady Bryan Silver-Min. Co.*, 2 L. D. Dep. Int. 673; *In re Harris*, 8 L. D. Dep. Int. 77, 78. The appellants contend that these regulations, rulings, and decisions were the law when the bond was given, and a part of the contract between the sureties on the bond and the government. The court below held otherwise, and we think properly, as, notwithstanding the rules, the proof clearly shows, and it is practically admitted, that Smith received the sum for which judgment was entered, as receiver of public moneys at the Tucson land office, for the sale of public lands, and no other purpose. Smith admits this to Brown, the register, and exhibits to him (Brown) annotations made by himself on the final proof papers as they were received, charging himself with the amount so received in his official capacity. Could any one contend that if Smith had been in the office at the time these cases were reached and decided, and with these official

notations on the papers showing payment to him, the entryman would not be entitled to his certificate? If the entryman would be entitled to his certificate because the proof had been found sufficient, and the payment found made when the proof was presented, then, if the receiver failed to turn the money into the treasury for such public lands sold, he is liable upon his bond for same, and the sureties must be held. The moneys thus received from entrymen were public moneys, paid to and received by Smith as receiver, as the authorized agent of the government, as a consideration for title to portions of the public domain; and upon such payment the government issued final receipts, accepting same as payment for the land filed upon, and issued patents, thus parting with its title. This was done under the ruling of letter "M." This was a new regulation, and, we think, is within the provisions of section 161 of the Revised Statutes of the United States, providing for a different rule of practice in the general land office. If not, it certainly correctly construes the law in relation to payment of these moneys to Smith, receiver, and the same being received by him in his official capacity, being public funds, and that such payment to him by the entrymen was a payment to the government. Such change in the former practice did not release the sureties. Was Smith liable to the government for this money received by him in his official capacity? No one, we think, would seriously contend that he was not. Then, how could the surety escape? For it is an elementary rule that a surety in a bond is liable to the same extent to which his principal is liable, by force of the bond. If, after an official bond has been signed, the nature of the office be changed by law, the bond ceases to be obligatory, on the theory that the office is no longer the same. *Gaussen v. United States*, 97 U. S. 584. There is no pretense that there was any change made in the duties of the office of receiver, but the claim is that there was a change in the ruling of the department which holds the sureties. Suppose Congress had passed a law saying that money paid by entrymen to receivers when presenting their final proofs to registers and receivers were public moneys, and this act had been passed after the giving of the bond; this would not release sureties. Mr. Commissioner Stone simply overruled decisions and regulations made by his predecessors. He was authorized, as we

have stated, under section 161 of the Revised Statutes of the United States to change the rules and regulations of his department. If sureties on official bonds were discharged by every change in the law relating to the duties of the person holding office, it would be of little use to obtain sureties. *United States v. McCartney*, 1 Fed. 104, and numerous cases cited by the court in that decision. There seems to be a rule of the treasury department requiring receivers of public moneys to deposit whatever sums come into their hands to the credit of the United States with a United States depository, whenever the amount reaches one thousand dollars. It could hardly be contended that the failure of a receiver to comply with this rule would release the sureties. Laches is not attributable to the government. Mr. Justice Story, in *United States v. Kirkpatrick*, 9 Wheat. 720, uses the following language: "The supposition that laches will discharge the bond cannot be maintained as law. Laches is not imputable to the government, and this maxim is founded, not in the notion of extraordinary prerogative, but upon great public policy. The government can transact its business only through its agents, and its fiscal operations are so various, and its agencies so numerous and scattered, that the utmost vigilance would not save the public from the most serious losses, if the doctrine of laches can be applied to its transactions."

It is assigned as error, the admission of the bond of Smith and his sureties in evidence at the trial of the cause, for the reason that the statutes required a bond for ten thousand dollars, and the bond in question is for the sum of thirty thousand dollars, on a claim that the same was extorted from Smith under duress. The evidence in the case does not bear out this view. It shows that the bond was increased from ten thousand dollars to thirty thousand dollars by direction of the President of the United States, and sets out the letter of the secretary of the interior to that effect. It was unquestionably a voluntary bond, taken by the proper officers of the proper department of the government, and the right to take such a bond is an incident to the duties belonging to such department. *United States v. Tingley*, 5 Pet. 115; *United States v. Bradley*, 10 Pet. 343; *United States v. Hodson*, 10 Wall. 395.

It is also contended that the court below erred in permit-

ting the item of \$1,692 to go to the jury for their consideration, the same being charged against Smith for a draft of that amount issued to Smith as receiver. The reason of this alleged error is, that appellant Christy asked one McConnell, an inspector of the interior department, on the 12th of January, 1890, to telegraph to the treasury department to stop payment, and he refused to do so. This draft appears to have been issued to Receiver Smith on October 5, 1889, when he was in office, and delivered to him by his clerk upon his return from leave of absence, and Smith put the same in his pocket. We are unable to see any obligation upon the government to stop payment. This was a negotiable instrument, and had probably long before passed out of the hands of Smith into other hands. Besides the government could not be bound by any statement or admission of Inspector McConnell. His laches could not be imputed to the government. *United States v. Kirkpatrick*, 9 Wheat. 720.

The treasurer's transcript, duly certified under section 886 of the Revised Statutes of the United States, was properly admitted in evidence in the court below, and was, by virtue of such statute, evidence of all things therein contained which came within the official knowledge of the accounting officers of the treasury department. The judgment is affirmed.

Baker, C. J., Bethune, J., and Rouse, J., concur.

[Civil No. 514. Filed August 24, 1896.]

[46 Pac. 212.]

NATHANIEL SHARP, Plaintiff and Appellant, v. W. L. GEORGE et al., Defendants and Appellees.

1. SCHOOLS — UNION HIGH-SCHOOL DISTRICT — ESTABLISHMENT — ELECTION—MAJORITY OF VOTES IN WHOLE DISTRICT SUFFICIENT TO ESTABLISH—LAWS ARIZ. 1895, ACT NO. 32, APPROVED MARCH 18, 1895, CONSTRUED.—If under act No. 32, *supra*, for the establishment of union high-school districts, trustees of a school district having a certain population petition the school superintendent for the establishment of a union high-school district, said superintendent shall

order an election therein for that purpose. In order that a union high-school district may be formed of two or more adjoining school districts, it is necessary that a majority of the trustees of each of the school districts shall petition for that purpose, and when that is done an election must be ordered therein. In such case, each of said school districts is a part of the proposed union high-school district, made such by the said petition. If at the election therein a majority of the votes in the district, as a whole, are for the union high-school district, it is then a district; otherwise, it is not.

2. **SAME—SAME—ELECTION—MAJORITY OF VOTES—LAWS ARIZ. 1895, ACT NO. 32, APPROVED MARCH 18, 1895, CONSTRUED.**—"If a majority of such votes be cast in favor of a high school, . . ." as used in section 3 of act No. 32, *supra*, means the majority of those voting, and has no reference to the number of qualified electors residing in the district.
3. **SAME—SAME—SAME—NOTICE OF ELECTION—FAILURE TO HOLD ELECTION IN SINGLE DISTRICT—NOT AFFECTING THE RESULT—DOES NOT AVOID ELECTION.**—Accidental failure to give notice of election and to hold election in one district to be consolidated into a union high-school district will not render void an election therefor where it appears that if all the qualified voters in such district had voted against the proposition the result would not have been changed.
4. **SAME—SAME—SAME—NOTICES—SUFFICIENCY—LAWS ARIZ. 1891, ACT NO. 16, CITED.**—Notices of election for union high-school district given according to the provisions of act No. 16, *supra*, are sufficient, this act governing the case.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge. Affirmed.

The facts are stated in the opinion.

Cox & Willis, for Appellant.

The notices of election state that the polls would open at nine A. M. and close at four P. M., instead of opening at eight A. M. and closing at sunset, as provided by the General Election Law. When the question of a special election is to come before the people of a community, and particularly when such elections involve the levying of additional taxes upon the residents and taxpayers thereof, the courts are unanimous upon the proposition that all the steps necessary to the calling and holding of such special elections must be strictly pursued in accordance with the statute. *People v. Seale*, 52 Cal. 620;

People v. Castro, 39 Cal. 69; *State ex rel. Crocker v. Echols*, 41 Kan. 1, 20 Pac. 523.

Notices of the election were not posted upon the door of each schoolhouse in the proposed high-school district ten days prior to the election. That such failure to have proper notices filed renders the special election void, see *Williams v. Town of Roberts*, 88 Ill. 11; *Hodgkin v. Frye*, 33 Ark. 716; *McPike v. Pen*, 51 Mo. 63; *State v. St. Louis etc. Ry. Co.*, 75 Mo. 526; *Greenbanks v. Boutwell*, 43 Vt. 219; *Harding v. Rockford etc. R. Co.*, 65 Ill. 90; *Hubbard v. Town of Williamstown*, 61 Wis. 397, 21 N. W. 295; *People ex rel. Rodgers v. Spencer*, 55 N. Y. 397; *Pratt v. Town of Swanton*, 15 Vt. 147.

The votes cast in favor of the union high school were not a majority of the electors residing in said high-school district, therefore the proposition did not carry. *People ex rel. Hetfield v. Trustees*, 70 N. Y. 32.

Millay & Bennett, for Appellees.

ROUSE, J.—The appellant, Nathaniel Sharp, as plaintiff, commenced an action against the appellees, W. L. George et al., as defendants, for an injunction to restrain the defendants from the collection of a tax for the maintenance of a certain union high school in a union high-school district, composed of school districts numbered 1, 2, 5, 7, 8, 16, 21, 27, 30, 34, and 38, in Maricopa County, Arizona. All of said school districts were adjoining, and a majority of the trustees of each petitioned the county school superintendent to establish a union high-school district, to be composed of said school districts. After receiving such petitions from all of said districts, the said superintendent fixed a date for the election, prepared notices thereof, and elections were held on said date in all of said districts, excepting school district No. 16. It appears from the evidence that by accident no notices of said election were posted up in said district No. 16. The evidence shows that at said election there were for the establishment of a union high-school district two hundred and eleven votes, and against it one hundred and twenty-nine votes. It is evident from the record that the trial court treated the territory embraced within the exterior limits of all the said school districts as one body; the several districts being treated as so many places for voting, as election precincts.

The law for the establishment of union high-school districts provides that if a majority of the trustees of a school district, having a certain population, petition the county school superintendent for the establishment of a union high-school district, said superintendent shall order an election therein for that purpose. It also provides that two or more adjoining school districts may be formed into a union high-school district. In order that a union high-school district may be formed of two or more adjoining school districts, it is necessary that a majority of the trustees of each of the school districts shall petition for that purpose, and when that is done an election must be ordered therein. It is evident that in such cases each of said school districts is a part of the proposed union high-school district, made such by the said petition; that collectively said school districts form, as it were, a union high-school district *in embryo*. *People v. Union High School Dist.*, 101 Cal. 655, 36 Pac. 119. If at the election therein a majority of the votes in the district, as a whole, are for the union high-school district, it is then a district; otherwise, it is not. *Id.*; Laws 18th Leg. Assem. Ariz., Act No. 32.

It is admitted that the majority at said election in favor of the proposition was not a majority of the qualified electors of the district, and for that reason appellant contends that a union high-school district was not created. In section 3 of said Act No. 32, *supra*, is the following, viz.: "If a majority of such votes be cast in favor of a high school. . . ." These words, considered in connection with other expressions used in said act lead us to the conclusion that the majority referred to is the majority of those voting, and has no reference to the number of qualified electors residing in the district. *People v. Union High School Dist.*, 101 Cal. 655, 36 Pac. 119; McCrary on Elections, sec. 173, p. 114; *State v. Renick*, 37 Mo. 270; *County of Cass v. Johnston*, 95 U. S. 360; *St. Joseph Township v. Rogers*, 16 Wall. 644.

It is admitted that no notice of the election was given, and that no election was held, in school district No. 16. It is contended by appellant that the failure to give the proper notice for the election in said district, and the failure to hold an election therein, made the entire election in said union high-school district void. We have already said that each school district was a part of the union high-school district, and

formed, as it were, a voting precinct therein. It is necessary that a notice of the election be given in some way, either by law or otherwise. *Sheen v. Hughes*, 4 Ariz. 337, 40 Pac. 679; *McPike v. Pen*, 51 Mo. 63; *State v. Railway Co.*, 75 Mo. 526; Cooley on Constitutional Limitations, 603. But it is the law that at a general election for officers a failure to have an election in one or more precincts of a county will not make the election void (Rev. Stats., par. 1734; *Louisville etc. R. R. Co. v. County Court of Davidson*, 1 Sneed, 637, 62 Am. Dec. 424), unless it be shown that the result would have been different if an election had been held in all the precincts. In this case it was shown that if an election had been held in school district No. 16, and all the qualified voters of said district had cast their votes against the proposition, still there would have remained a large majority in its favor. If this had been an application to prevent the establishment of a high school, instituted in due time, the court might have felt constrained to have stopped the proceedings until an election had been held in each school district; but in this case the steps taken were after the high school was established, and heavy obligations had been incurred with reference thereto. Under these circumstances, the failure to have an election in an inconsiderable portion of the district, in which, if an election had been held, it would not have changed the result, did not make the said election void; and the refusal of the court to grant the injunction was proper. The notices of the election were according to the provisions of act No. 16 (Laws 1891, p. 35), which act governs in this case; hence were sufficient. The judgment of the district court dissolving the injunction is affirmed.

Hawkins, J., and Bethune, J., concur.

[Civil No. 429. Filed September 8, 1896.]

[46 Pac. 67.]

Estate of JOHN D. WALKER, Deceased. In re Application of JUANA WALKER, a Minor, by ROSETTA JONES, her Guardian, for Distribution. W. H. WALKER et al., Appellees.

1. MARRIAGE—WHITE MAN AND INDIAN—VOID IN 1871—COMP. LAWS ARIZ. 1877, SECS. 1-4, CHAP. 30, P. 317, CONSTRUED.—Marriage in fact could not be consummated in 1871 in Arizona between a Pima Indian squaw and a white man, either by ceremony as provided by statute, *supra*, for persons capable of contracting the marital relation, by the customs of said Indian tribe, cohabitation, or any other method. Such marriages were null and void.
2. TERRITORIES—SOVEREIGNTY—POWERS OF LEGISLATURE—INDIAN RESERVATION—RESERVATIONS—MARRIAGE OF WHITE MAN AND INDIAN—ON RESERVATION—VOID—COMP. LAWS ARIZ. 1877, SEC. 3, CITED.—There is but one sovereignty in Arizona—that of the United States—which delegates its power to legislature of the territory; and the legislative acts of the territory being operative in all parts of the territory, including Indian and all other executive or legislative reservations, unless expressly forbidden by the Congress of the United States, a marriage of a white man and Indian squaw according to the customs of her tribe is void, though established upon an Indian reservation. Statutes, *supra*, cited.
3. INDIANS—CHILD OF WHITE MAN AND INDIAN—STATUS.—The status of a child of a void marriage between a white man and a Pima squaw is that of a Pima Indian.
3. DESCENT AND DISTRIBUTION—BASTARD—CHILD OF WHITE MAN AND INDIAN—REV. STATS. ARIZ. 1887, PAR. 1470, CONSTRUED.—Paragraph 1470, *supra*, provides: "Where a man having by a woman a child or children, and afterwards intermarrying with such woman, such child or children, if recognized by him, shall thereby be legitimized and made capable of inheriting his estate. The issue also of marriages deemed null in law shall nevertheless be legitimate." A child of an attempted marriage of a white man and an Indian, married according to the customs of her tribe, is not legitimate under the last sentence of said statute. Both parts thereof require a marriage, and in such case there is no marriage in fact.
4. APPEAL AND ERROR—PROBATE COURT—DISTRICT COURT—BY SINGLE PARTY IN INTEREST—JURISDICTION.—Where an appeal is taken from the probate court by a party having the right to appeal, the whole matter is taken out of that court, and the district court has jurisdiction.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Pinal. Owen T. Rouse, Judge. Affirmed.

Statement of facts:—

John D. Walker died intestate in Napa County, California, about the second day of September, 1891, and at the time of his death was a resident of Pinal County, Arizona. On September 18, 1891, A. J. Doran was duly appointed administrator of Walker's estate by the probate court of Pinal County, and duly qualified as such. Juana Walker, a minor, by her guardian, Rossetta Jones, filed a petition in the probate court of Pinal County on the twelfth day of May, 1893, asking that an order be made distributing the estate to her, the said Juana, as the sole heir of John D. Walker, deceased. Said petition was resisted by said A. J. Doran, the administrator of said estate, and by William Walker and other brothers and sisters of John D. Walker. By order of said probate court, that petitioner file a bill of particulars, the following bill of particulars was filed, viz: "(1) That the said Juana Walker was born at or near Blackwater, on the Sacaton Indian Reservation, in the county of Pinal, A. T. (2) That the mother of the said Juana Walker was a Pima Indian squaw, named Chur-ga. (3) That Juana Walker is the child of Chur-ga and John D. Walker, and was born on said reservation in lawful wedlock, contracted on said reservation, and while said Chur-ga and John D. Walker were living and cohabiting together as man and wife; and said child, ever since and until the death of said John D. Walker, was recognized and acknowledged by him, the said Walker, to be his child, begotten of the said Chur-ga, on divers and numerous occasions, to divers persons. (4) That the said Chur-ga is dead." The petition of said Juana was resisted by the said administrator and the brothers and sisters of the deceased upon the ground, in effect, that by the petition Juana Walker was not entitled to the estate of John D. Walker; and, further, that John D. Walker left no father or mother or children or their descendants, that he had never married, and that his only heirs were his said brothers and sisters. The case was tried in said probate court, and on July 28, 1893, a judgment was entered in said court in favor of said Juana Walker. Thereafter the

said administrator and the said brothers and sisters appealed the case to the district court of Pinal County. The case was tried anew in said district court, commencing on the twenty-third day of March, 1894, one Isaac D. Smith, a witness for petitioner, being on the stand. Counsel for the respective parties agreed to the following, to wit: "It is consented by the parties hereto that the plaintiff may make the following offer of proof, and the same to stand and to be considered as though raised by apt and proper questions to the witness on the stand: Plaintiff, appellee and petitioner, now offers to prove by the witness on the stand, and will so prove if permitted by the court so to do, that the petitioner is the child of John D. Walker, deceased, and was begotten by him; that her mother was an Indian woman, named Chur-ga, a member of the Pima tribe of Indians, and that John D. Walker, deceased, a white man, was, prior to the conception of the said Juana Walker, on the reservation of the Pima and Maricopa Indians in Arizona, and intermarried with the said Indian woman, Chur-ga, according to the law of the Pima tribe of Indians, and that the said John D. Walker, deceased, recognized petitioner as his child, and supported her; to which proof counsel for appellants (Walker brothers and sisters and the administrator) objected, on the ground that at the time thereof such marriage between a white man and an Indian woman was by the laws of Arizona illegal and void, and the court sustained the objection, and refused to permit such proof of marriage, but would admit the proof of recognition that it was his child and that he had given it support." To the ruling of the court the petitioner, Juana Walker, excepted, but offered no evidence of recognition and support, and appeals.

Fitch & Campbell, J. B. Woodward, Abram Humphries, Barclay Henley, P. B. McCabe, C. W. Wright, and Street & Frazier, for Appellant.

Any act purporting to deal with the domestic concerns of the Indians on their reservations is void. Organic Law of Arizona, sec. 1839; *Goodall v. Jackson*, 20 Johns. 693, 11 Am. Dec. 351; *State v. McKinney*, 31 Kan. 570, 3 Pac. 356.

The principle involved in this last case, as to the effect of

a general statute of this character on that portion of the state occupied by Indians, is on all-fours with the case at bar, and Congress, recognizing that fact, has passed a special act (sec. 1910, Organic Laws of Arizona), giving to the territorial courts jurisdiction over certain crimes committed by Indians on their reservations, clearly evincing the idea that without such special legislation the territorial courts would have no jurisdiction. The domestic affairs of the Indians, including the laws regulating and controlling Indian marriages, are subject to their own control, only as regulated by Congress. Indians are wards of the government, and not citizens either of the United States or the territory wherein they are situated. They owe the state or territory no allegiance, and are not subject to the duties and responsibilities of citizens. Acts of the territorial legislature purporting to deal with their domestic concerns are void. Acts of Congress, June 30, 1834, 4 Stats. at Large, 732; 15 Stats. at Large, 26; *In re Camille*, 6 Saw. 541, 6 Fed. 256; *United States v. Wirt*, 3 Saw. 161, Fed. Cas. Nos. 1674, 1675; *In re Ah Yup*, 5 Saw. 155, Fed. Cas. No. 104; *Kansas Indians*, 5 Wall. 737; *State v. Campbell*, 53 Minn. 354, 55 N. W. 553; *Marion v. State*, 20 Neb. 233, 57 Am. Rep. 825, 29 N. W. 911.

The Maricopa and Pima Indian reservations, at the time of the marriage of John D. Walker to the Indian woman Chur-ga, upon said reservation, was Indian country, and thereby became excluded from the jurisdiction of the territorial laws. *United States v. Knowlton*, 3 Dak. 58, 13 N. W. 573; *Spalding v. Chandler*, 84 Mich. 140, 47 N. W. 593; *Thompson v. Dookson*, 38 Cal. 593; *Smith v. Brown*, 8 Kan. 610; *Wall v. Williams*, 11 Ala. 839; *Johnson v. Johnson*, 30 Mo. 72, 77 Am. Dec. 598.

At the time of the marriage of Walker to the mother of appellant there was no law of Congress prohibiting such an alliance, and since that date Congress has passed an act recognizing the validity of such marriages (25 Stats. at Large, 392), and marriages valid where contracted must be recognized by the laws of the state. *Decouche v. Savotier*, 3 Johns. Ch. 190, 8 Am. Dec. 131; *Medway v. Needham*, 16 Mass. 157, 8 Am. Dec. 131; *Fornskill v. Murray*, 1 Bland. 479, 18 Am. Dec. 344; *Lavivierre v. Lavivierre*, 77 Mo. 512; *Hiram v. Pierce*, 45 Me. 367, 71 Am. Dec. 555.

W. H. Barnes, J. H. Kibbey, S. M. Franklin, and W. R. Stone, for Appellee.

By the act of 1865, in force for years before this child was born, such a marriage was illegal and void. Comp. Laws, p. 317, sec. 3. It is sought to make it appear that an Indian reservation is not within the territory and not covered by the territorial laws. The law does reach white men who are citizens of Arizona, or those who come within her borders, and prohibits them from marriages with Indians. The laws of the territory reach into the reservation to tax a railroad running over it, and to tax goods, wares, and merchandise thereon. It is not a foreign country in the sense that Arizona must recognize marriages valid where solemnized, though they would have been void here. *Wilbur's Estate v. Bingham*, 8 Wash. 35, 40 Am. St. Rep. 886, 35 Pac. 407; *United States v. Kagama*, 118 U. S. 375, 6 Sup. Ct. Rep. 1109; *Cherokee Nation v. State*, 5 Pet. 20.

If the marriage was void, then this child as the offspring of Chur-ga is an Indian. That is her *status*, and she cannot be anything else. Nothing short of an act of Congress can change this *status*. *Utah R. R. Co. v. Fisher*, 116 U. S. 28, 6 Sup. Ct. Rep. 246; *Elk v. Watkins*, 112 U. S. 94, 5 Sup. Ct. Rep. 41.

HAWKINS, J. (after stating the facts).—Juana, a Pima Indian girl, by her guardian, claims the estate of John D. Walker, deceased, upon the theory that her mother, Chur-ga, a Pima Indian woman, was married to said Walker, who was a white man, according to the customs of such Indians governing marriage, and that she is the child of such union. The statute in force in Arizona at the date of such pretended marriage,—viz., 1871,—is the following (secs. 1-4, c. 30, p. 317, "Marriages," Comp. Laws Ariz. 1877):

"Section 1. Marriage is considered in law as a civil contract, to which the consent of the parties is essential.

"Sec. 2. All marriages between parents and children, including grandparents and grandchildren of every degree, between brothers and sisters, of the one-half as well as the whole blood, and between uncles and nieces, aunts and nephews, are declared to be incestuous, and absolutely void.

This section shall extend to illegitimate as well as legitimate children and relations.

"Sec. 3. All marriages of white persons with negroes, mulattoes, Indians or Mongolians, are declared illegal and void.

"Sec. 4. Whoever shall contract marriage in fact, contrary to the prohibitions in the two preceding sections, and whoever shall solemnize any such marriage, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by fine or imprisonment, or both, at the discretion of the jury which shall try the cause, or, if the conviction be by confession, at the discretion of the court, the fine to be not less than one hundred, nor more than ten thousand dollars, and the imprisonment to be not less than three months, nor more than ten years."

It is readily seen that this pretended marriage, if it had been a marriage in fact, was illegal and void, and imposed no obligation on either party thereto. It was provided by the law then in force that marriages had to be solemnized by certain persons designated. A marriage ceremony had to be performed, and the person officiating was compelled to keep a record thereof. Secs. 6, 8, c. 30. *supra*. There must be a marriage in fact (sec. 4, *supra*), and the person officiating, in addition to keeping a record himself, was compelled to report the marriage to the county recorder, and such recorder had to record the same (sec. 9, c. 30, *supra*). We do not mean to say that if two persons capable of contracting should have done so, and consummated such contract by cohabiting together, and acknowledging that they were husband and wife, and lived all their lives as such, it would not have been a marriage without the aid of a ceremony sufficient for the acknowledged children of such union to inherit. We do hold, however, that marriage in fact could not be consummated at the time this was alleged to have taken place, in Arizona, between a Pima Indian squaw and a white man, either by ceremony as provided in said statute for persons capable of contracting the marital relation, by the customs of said Indian tribe, cohabitation, or any other method. Such marriages were null and void. The two essentials of a valid marriage are capacity and consent. The stipulation of counsel set out in the statement of facts admits that there was no marriage

of the parties by a person authorized to marry them; the union or relation, if any, which existed between Walker and the Indian woman, Chur-ga, was therefore not a marriage in fact. It is also admitted therein that Walker was a white man, and Chur-ga an Indian woman. Those being the admitted facts, the union, as a marriage, would be null and void, and no decree would be necessary to annul it. The learned judge who tried the case therefore committed no error in sustaining the objections to the questions contained in such stipulation with reference to the marriage, as that fact could not establish the rights of appellant as an heir. Such heirship, if any existed, must be established on some other basis,—adoption or acknowledgment. As the court below ruled that appellant could offer any evidence as to her adoption or acknowledgment by John D. Walker, and as she failed to offer any such testimony, she cannot now be heard to complain. If she had offered testimony showing that she was the offspring of an illicit union between John D. Walker and a Pima Indian squaw named Chur-ga, and that she had changed her *status* from a Pima Indian to the child of John D. Walker, who, when he left the Pima Indian Reservation, instead of leaving her there, had taken her with him, and educated her, introduced her to his relatives, and held her out to the world as his daughter, and any and all other probative facts showing that John D. Walker acknowledged her to be his child, and intended her to be his heir, and wanted her to inherit his estate, there might be some basis for her claim.

Appellant contends that the alleged relation between John D. Walker and Chur-ga was a valid marriage, because it was established and existed between them on the Pima and Maricopa Indian Reservation according to the customs of such Indians, and notwithstanding the laws of Arizona forbade such marriages. Such laws were not in force upon the Indian reservation, and such marriage, being valid according to the custom of the Indians upon such reservation, was valid everywhere; i. e. the Indian reservation is the same as a foreign country, and marriages under the Arizona statute then in force, valid in the country where solemnized, were valid in Arizona. This doctrine is not tenable in a territory. There are not two sovereignties here, one for the power owning the reservation and one for the territory. There

is only one sovereignty here,—that of the United States,—which delegates its power to the territory to legislate on all rightful subjects of legislation; and the legislative acts of the territory are operative in all parts of the territory, including Indian and all other executive or legislative reservations, unless expressly forbidden by the Congress of the United States. If both of these parties had been Indians, the courts would recognize such relations as a marriage. Such marriages between a white man and an Indian woman have been upheld by the decisions of some of the states. *Johnson v. Johnson*, 30 Mo. 72, 77 Am. Dec. 598; *Wall v. Williams*, 11 Ala. 839. In Missouri the doctrine of common-law marriages has always been upheld. *Dyer v. Brannock*, 66 Mo. 391, 27 Am. Rep. 359. But such marriages have never been recognized in Arizona, and the marriages held valid in Missouri between a white man and an Indian woman were where the marriage occurred outside of the state in “an Indian country,” in another sovereignty; and it does not appear that any law of the state was violated. The alleged marriage being void, it could not be proved for any purpose. The law reached white men in every part of Arizona and forbade such marriage. *Wilbur v. Bingham*, 8 Wash. 35, 40 Am. St. Rep. 886, 35 Pac. 407.

There being no marriage between Walker and Chur-ga, and Chur-ga being a Pima Indian, the child, being her offspring, is a Pima Indian. This is the *status* of Juana. She is a ward of the government, and her *status* so remains until some law of Congress, or the legislation of Arizona under authority of Congress, changes the same. As to whether an Indian is subject to adoption under paragraph 1392 of the Revised Statutes we do not deem it necessary to decide. The court below offered to admit any proof regarding same, but none was offered. It is true that counsel for Juana, in the agreed statement, say that they offer to prove by a witness on the stand, in addition to other things, “that the said John D. Walker, deceased, recognized petitioner as his child, and supported her”; and the court offered to receive any testimony thereon. Yet the court might have sustained any objection to such conclusions. If there were any proof on these questions, the facts should have been offered, so the court could determine whether or not “he recognized her as his child, and supported her.” The testi-

mony of the witness Smith does not warrant such conclusions. It does not prove that John D. Walker publicly acknowledged claimant to be his child with the intent of making her his lawful heir, or that he reared and educated her in his own station of life, and introduced her to his brothers and sisters as his child, and that he wanted her to inherit his estate. In order for her to recover this estate, such testimony should have been offered, and the proof must have been clear and conclusive. Estates are not to be diverted from the ordinary channels of the law of inheritance, except upon proof which is conclusive.

Counsel for appellant contend that as appellant, Juana, is the child of John D. Walker, and though the marriage between Walker and Chur-ga, the Indian woman, was void, nevertheless she is the heir by virtue of the provisions of paragraph 1470 of the Revised Statutes of Arizona. That paragraph is in the chapter on "Descent and Distribution," and is as follows: "Where a man having by a woman a child or children, and afterward intermarrying with such woman, such child or children, if recognized by him, shall thereby be legitimized and made capable of inheriting his estate. The issue also of marriages deemed null in law shall nevertheless be legitimate." In no way can that paragraph be made applicable to the case at bar. It applies where a man has a child by a woman, and then marries her, and then recognizing the child, it thereby becomes legitimized, and can inherit from him. It requires marriage and recognition as a condition. The next part declares, "The issue also of marriages deemed null in law shall nevertheless be legitimate." In both parts of said paragraph there must be a marriage. In the case at bar there was no marriage. If said section is applicable without marriage, it follows that it would make legitimate every bastard; and the paragraph on that subject would be useless. By paragraph 1471 of the Revised Statutes of Arizona it is provided: "Bastards shall be capable of inheriting from and through their mother." Thus it will be seen that, notwithstanding paragraph 1470, there are certain children who are bastards. Bastards are those not born in lawful wedlock. Appellant, not having been born of parents who had been married, was certainly a bastard. Counsel for appellant cites the case of *Dyer v. Brannock*, 66 Mo. 391, as an authority to support his con-

tention that, though the marriage of Walker to Chur-ga was null, yet appellant is legitimate. The facts of that case show: "Zachariah Wilson was a river pilot in 1819, and one Mrs. Collins, a widow, at that time kept a boarding-house in St. Louis. There was evidence to show that Wilson and Jane Collins, the daughter of Mrs. Collins, and then about nineteen years old, on the 24th of August, 1819, about ten o'clock at night, declared their intention, in the presence of the mother and brothers of Jane and several boarders who were present, to live together as husband and wife. There was no magistrate or other person authorized by the statutes of the territory to celebrate marriage rites present on the occasion, but they stood up on the floor of the sitting-room, or most public room in the house, side by side, with joined hands, and it was announced to those present by the mother or brother of Jane that she and Wilson had agreed to marry, to which they both assented by an inclination of the head. They then retired to a bedroom, and cohabited together as man and wife for three weeks. When Major Long reached St. Louis on his expedition to the Rocky Mountains, Wilson joined the expedition. The result of his cohabitation was a daughter named Cynthia Elizabeth, from whom plaintiff's title is derived. It was understood on the departure of Wilson that Mrs. Collins should take care of Jane, and that he would, when opportunity presented, remit some money to support her during his absence, which he occasionally did. Meanwhile, Mrs. Collins and her family removed to St. Charles, and were living there when Wilson returned to St. Louis, in 1824. He was then married, in accordance with the forms provided for by the statute then in force, to Sarah Ann Adams, the owner of the property now in controversy. By this marriage a female child was born in 1826, who survived the mother, and died in 1827. In 1830, after the death of Sarah Ann and her child, Wilson sent for Jane Collins, who was then in St. Charles, and he and Jane Collins afterwards lived together as man and wife until his death, in 1836, recognizing her as his wife, and treating the daughter, Cynthia Elizabeth, as his child. After the death of Wilson, Cynthia Elizabeth married Abner W. Dyer, and the plaintiffs are the descendants of that marriage. Mrs. Dyer died July 13, 1869, and her husband died June 25, 1870. This ejectment was brought August 11,

1872." This case shows clearly that Missouri recognized common-law marriages.

Very much is said in the briefs regarding the appeal from the probate court to the district court. William Walker was a party in interest, and had a right to appeal, and, the matter in the probate court being appealed by one of the parties in interest, the whole matter was taken out of that court, and the district court had jurisdiction. The district court did not err in sustaining the appeal from the probate court. The judgment of the lower court is affirmed.

Rouse, J., concurs.

Bethune, J., having been of counsel for the petitioner in the probate court, took no part in this case in this court.

Baker, C. J., dissents.

[Civil No. 436. Filed September 21, 1896.]

[46 Pac. 74.]

THE CONSOLIDATED CANAL COMPANY, Defendant
and Appellant, v. A. J. PETERS, Plaintiff and Appellee.

1. PLEADING—EVIDENCE—VARIANCE—TRIAL—LEAVE TO AMEND—AFTER CLOSE OF EVIDENCE—DISCRETIONARY.—The action of the trial court in permitting plaintiff to amend his complaint to conform to the evidence, after the close of plaintiff's evidence and motion by defendant for dismissal of the action for variance between pleading and proof, is discretionary.
2. JOINT-STOCK COMPANY—MEMBERS—PARTNERS—ACTION — PARTIES — NECESSARY.—Shareholders in an unincorporated joint-stock company are partners, and ordinarily the members must all be joined in a suit upon a contract entered into between such members and a third party.
3. SAME—CONTRACTS—JOINT OR SEVERAL—ASSUMPTION OF DUTY TO RESPECTIVE PARTIES — SEVERAL—ACTION — PARTIES.—A contract between members of an unincorporated joint-stock company and defendant, in which defendant agreed "to deliver water to the respective parties," must necessarily be construed as a contract wherein, if any damage occurred thereunder to any of the parties thereto, such party could maintain his suit for such damages without joining the other parties.

4. SAME—SAME—SAME—SAME—CONSTRUCTION—SEVERAL—ACTION—PARTIES.—Where the language of a contract requires the obligor to account to each of the obligees, respectively, or, by the use of any words, imports a separate right of action, the contract is several, and each obligee may sue thereon.
5. IRRIGATION—DAMAGES FOR FAILURE TO DELIVER WATER—SPECIAL CONTRACT—PLEADING—COMPLAINT—FAILURE TO STATE CAUSE OF ACTION.—A complaint in an action for damages for failure to deliver irrigating water to a particular tract of land, setting up a contract wherein defendant agrees to deliver water to the plaintiff at and on the basis rate of not less than three shares for the necessities of a quarter-section, said water being in the river, it being understood that in case of low water the defendant is to deliver the amount of water that the Utah Canal would or could deliver if they were in full control, and alleging that the tract was a part of the premises upon which the water was to be delivered under such contract, and that defendant failed, neglected, and refused to deliver water at the rate specified in the contract, or sufficient water to mature the crops upon said premises, there being water in the river, capable of being diverted by defendant, sufficient therefor; and that in the period of low water defendant failed, neglected, and refused to deliver to said premises the amount of water that the Utah Canal would or could deliver if they were in full control, and by reason, etc., fails to state a cause of action. Plaintiff fails to allege that he ever requested defendant to deliver water to him at any place; that he did not get all the water he contracted for; that the water contracted for was not delivered to plaintiff at some other point; fails to state the quantity necessary to irrigate said land, or the quantity actually delivered, nor is the difference capable of being computed; nor is there any allegation as to how much, or whether any quantity, could or would have been received by the plaintiff from the Utah Canal in periods of low water.
6. PLEADING—BREACH OF CONTRACT—FAILURE TO STATE CAUSE OF ACTION—HOW REACHED.—A complaint that totally fails to state a breach of the contract sued on states no cause of action, and a failure to state a cause of action may be availed of by demurrer, by objection to the evidence, by motion for judgment on the pleadings, by motion in arrest of judgment, or on motion for a new trial.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge. Reversed.

Statement of facts:—

This is an action brought by the appellee, A. J. Peters, to recover of the appellant, the Consolidated Canal Company, the sum of five thousand dollars damages for the loss and destruc-

tion of appellee's crop of grain on section 17, township 1 south, range 5 east, in Maricopa County, for the crop-raising season of 1893. The destruction of said crop is, in the original complaint filed herein, alleged to have been caused by the failure of the appellant to furnish the appellee the necessary amount of water at proper times during the crop-raising season of 1892-1893 to produce a mature crop on the lands aforesaid. It is alleged in substance in the original complaint that for the agreed price of fifty cents per acre for the land above described, to be paid by the appellee to the appellant, the appellant agreed to carry and convey from the Salt River, and deliver to the said appellee, upon the land described, the amount of water which the said appellee was and should be entitled to receive and use upon said lands by virtue of his appropriation, for and during the space of one year from the first day of September, 1892, and while there was flowing in said Salt River at a point where the said appellant, by its said canal, diverts water from said Salt River, ample and abundant water to supply the needs and requirements of said appellee in respect to said premises, and to which said water the appellee was entitled by virtue of his appropriation, and which said water was necessary and essential to the production of a crop upon said premises; that appellant failed, neglected, and refused to carry and convey said water from said Salt River to said premises, and failed, neglected, and refused to deliver the said water to the appellee's premises; and that by reason thereof, it is alleged in said original complaint, the crops of the appellee, planted and sowed upon said land, failed to mature, develop, and ripen, and were wholly dried up, lost, and destroyed. To this original complaint the appellant demurred, and alleges, as a ground of demurrer, that said original complaint does not state facts sufficient to constitute a cause of action. Said demurrer was by said court overruled, and the appellant excepted. The appellant further answered said original complaint, denying each and every allegation therein contained. Upon the trial of said action, after appellee had introduced in evidence the written contract, the basis of said action as alleged in said original complaint, the appellant moved to dismiss said action on the ground of a material variance between the proof and the allegations in the complaint. Thereupon the court announced that he would sustain

the motion. The appellee at once requested the court not to make the ruling absolute, and to allow him time to amend his original complaint. The court then adjourned the case until the following Monday, and gave appellee leave to amend his original complaint herein, to which ruling the appellant then and there duly excepted. The appellee then filed his amended complaint, alleging that he was the owner of certain shares of stock in the Utah Enlargement and Extension Company and the Eureka Canal Company, joint-stock associations owning and operating certain canals or irrigating ditches running from the said Salt River to a point near said section seventeen (17), by means of which said canals or irrigating ditches, and by virtue of the ownership of said shares of stock, said appellee had received the waters from the said Salt River so diverted and applied, and appropriated by him for the irrigation of said premises; that on the thirtieth day of September, 1892, the appellant entered into a contract in writing by its president, A. J. Chandler, with the appellee and others, which contract was in words and figures as follows, to wit:—

“This agreement, made and entered into this 30th day of September, A. D. 1892, by and between the Consolidated Canal Company, by its president, A. J. Chandler, party of the first part, and A. J. Peters, E. Olsen, L. Harmon, George Drew, A. Marshall, W. W. Dobson, J. S. Watrous, F. T. Powers, M. Wals, J. Newman, J. L. Wesson, P. Eisenbise, N. Peterson (trustee), C. T. Springer, W. W. Dobson (trustee), C. Siegel (trustee), J. R. Andrews, A. J. Huston, parties of the second part, owners, shareholders, or renters of the Utah Canal Enlargement and Extension Company and the Eureka Canal Company, is as follows: We, the parties of the second part, rent our respective shares, or the shares we have rented to said party of the first part, for the ensuing year; and I, A. J. Chandler, president, party of the first part, agree to keep up all assessments levied against all of the shares hereto assigned, during the term hereof, and to deliver water to the respective parties hereto at and on the basis rate of not less than three (3) shares for the necessities of a quarter section, said water being in the river. And we, the parties of the second part, hereby give the first party our respective proxies to vote our respective shares during the term hereof, on matters pertaining to assessments only. The above shall not be construed as

to interfere with the board of directors and secretary from carrying out the contract made between the Utah Irrigating Ditch Company and the Alma Irrigating Ditch Company, and as modified by the subsequent agreements, or from making agreements and fixing the time for the necessary cleaning of the Utah Canal Extension and Eureka Canal. It being understood that in case of low water said first party is to deliver that amount of water that the Utah Canal would or could deliver if they were in full control. And in case said first party fails to deliver water, same being in the river, then these presents shall be null and void. In witness whereof, we have hereunto set our hands and seals the day and year first above written. Consolidated Canal Company. A. J. Chandler, President.

Name.	Number of Shares.
"Alfred J. Peters.....	18
"Alfred J. Peters.....	2
"Ellingsen, per A. J. Peters.....	2
"George A. Brew, B. Heyman.....	5
"George A. Brew, H. N. McLoagall.....	6
"George A. Brew, J. S. Armstrong.....	2
"J. Newman, per F. T. Powers.....	3
"M. Walsh, per F. T. Powers.....	3
"F. T. Powers.....	3
"N. Peterson, Trustee Ruffs.....	8
"N. Peterson, B. Heyman.....	3
"N. Peterson.....	6
"C. T. Springer, 4 Old Utah & Extension; 2 Utah Extension (6).....	6
"P. J. Eissenbise	3
"B. W. Westover.....	3
"A. J. Huston.....	4
"George Bauer (Bauer)	2"

In said amended complaint it was alleged that said shares of stock in the Utah Canal Enlargement and Extension Company and the Eureka Canal, mentioned in said contract and agreement, were and are the majority of the shares of stock in said company and canals. It is further alleged that the appellant entered into the possession and control of the canal of the Utah Canal Enlargement and Extension, and the

Eureka Canal, with their connections, and that said appellant remained in possession and control thereof until July 1, 1893. It is also alleged in said amended complaint that section 17 aforesaid was a part of the premises upon which the said water was to be delivered by the appellant, according to the terms of said contract, during the crop-raising season of 1893; that the said appellant, contrary to his agreement, undertakings, and promises, failed, neglected, and refused to deliver water to the appellee, upon the premises described in said amended complaint, upon the basis rate of not less than three of the shares mentioned in said contract for the necessity of a quarter-section of said premises during the crop-raising season of 1892-1893, and that the appellant failed, neglected, and refused to deliver to the appellee, upon said premises, sufficient water to irrigate the crops growing upon said premises during the crop-raising season of 1892-1893, when there was flowing in said Salt River, where the same could be diverted to said premises, water sufficient for said purpose, and for which purpose the appellee had, by said contract, rented to said appellant three of said shares of stock for each quarter-section of land, and that the appellant failed, neglected, and refused to perform each and every obligation of said contract, and that in the period of low water in said Salt River during the crop-raising season of 1892-1893 the said appellant failed, neglected, and refused to deliver to said appellee, upon said premises, the amount of water that the Utah Canal would or could deliver if they were in full control, and by reason of which appellee's crops sowed upon said premises failed to develop, mature, and ripen, and were wholly dried up, lost, and destroyed.

To this amended complaint the appellant demurred: First, from defective parties, in that said contract was jointly executed by the plaintiff and others; that said complaint should join all of the named parties to said contract. Further, that said amended complaint did not state facts sufficient to constitute a cause of action. This demurrer was by the court overruled, to which ruling the appellant duly excepted. Appellant then answered the amended complaint herein: First, that there were defective parties, in that all the parties were not joined, and asked that upon that ground the action be dismissed, which was denied, and to which the appellant duly

excepted; and the appellant further answered the amended complaint herein, denying each and every allegation in said amended complaint contained. Upon the trial of said cause a verdict was rendered for the appellee, and against the appellant for the sum of five hundred dollars, appellee's costs being taxed at \$630.60. Judgment was rendered for the amount of said verdict and costs. A motion for a new trial was duly filed, and overruled by the court to which ruling the appellant duly excepted, and thereupon this appellant appealed to this court.

C. F. Ainsworth, W. H. Barnes, and J. D. Pope, for Appellant.

When there is a question of a lack of proof the question of amendment does not cure that defect, and the rule is that the action should be dismissed. *Johnson v. Moss*, 45 Cal. 515; *Dougherty v. Mathews*, 35 Mo. 520, 88 Am. Dec. 126; *Carson v. Cummings*, 69 Mo. 325; *Sheehy v. Mandeville*, 7 Cranch, 208; *Nichols v. Larkin*, 79 Mo. 264.

Judges are not required to submit a case to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant a jury in finding a verdict in favor of the party introducing such evidence. It is not a question whether there is literally any evidence, but whether there is any evidence upon which the jury can properly proceed to find a verdict for the parties introducing it upon whom the burden of proof is imposed. *Commissioners v. Clark*, 94 U. S. 278; *Colt v. Sixth Avenue R. R. Co.*, 47 N. Y. 671; *Brooks v. Summerville*, 106 Mass. 271; *Reed v. Deerfield*, 8 Allen, 522; *Todd v. Old Colony R. R. Co.*, 7 Allen, 207, 83 Am. Dec. 679; *Gavitt v. Manchester R. R. Co.*, 16 Gray, 501, 77 Am. Dec. 422; *Morgan v. Durfree*, 69 Mo. 469, 33 Am. Rep. 508; *Connor v. Giles*, 76 Me. 732; *Rourke v. Bullens*, 8 Gray, 549; *Herbert v. Butler*, 97 U. S. 319; *Bowditch v. Boston*, 101 U. S. 553; *Greggs v. Houston*, 104 U. S. 553; *Simmons v. Chicago*, 110 Ill. 340; *Geary v. Simmons*, 39 Cal. 224; *Vanderford v. Foster*, 65 Cal. 49.

The failure to state a cause of action may be availed of by demurrer, by objection to evidence, by motion for judgment on the pleadings, by motion in arrest of judgment, or on

motion for a new trial; it is never waived. *Kelly v. Kriess*, 68 Cal. 210, 9 Pac. 129; *Silcox v. Lang*, 78 Cal. 118, 20 Pac. 297; *Richards v. Travelers Ins. Co.*, 80 Cal. 505, 22 Pac. 939; *San Francisco v. Pennie*, 93 Cal. 465, 29 Pac. 66.

W. J. Kingsbury, Millay & Bennett, and Cox & Street, for Appellee.

The matter of permitting the plaintiff to amend was one purely within the discretion of the court. *Tryon v. Sutton*, 13 Cal. 490; *Bank v. Stover*, 60 Cal. 387; *Clark v. Phoenix Ins. Co.*, 36 Cal. 176; *Valentine v. Couch*, 32 Cal. 340, 91 Am. Dec. 589; *Bell v. Knowles*, 45 Cal. 193.

HAWKINS, J. (after stating the facts).—I do not deem it necessary to review the action of the court below in sustaining the motion of plaintiff, after the evidence was closed on the trial of the original complaint, to be allowed to amend his complaint. This action was in the discretion of the court below. The contract set out in the amended complaint was executed on the 30th of September, A. D. 1892, and declared to be for the ensuing year. In the closing part of the third subdivision of said complaint it is alleged that the said contract was made for "the crop-raising season of 1892." This is probably a clerical error. If I so treat it, then the pleadings should be considered on their merits. It is shown on the face of the complaint that the plaintiff and others therein named were shareholders in an unincorporated joint-stock company; and it sets out a contract made by the several individual stockholders with the defendant to do certain things. As the shareholders in such a company are partners (*Lindley on Partnership*, p. 5; *Smith v. Warden*, 86 Mo. 382; *Richardson v. Pitts*, 71 Mo. 128; *Martin v. Fewell*, 79 Mo. 401; *Hurt v. Salisbury*, 55 Mo. 310; *Pettis v. Atkins*, 60 Ill. 454; *Flagg v. Stowe*, 85 Ill. 164; *Hodgson v. Baldwin*, 65 Ill. 532), and, as a general rule, the members, however numerous, must join in the suit on such contract (*Dacey on Parties*, 151), yet, as the contract in the case at bar shows that the parties of the second part rented their respective shares to the party of the first part, and "party of the first part agrees . . . to deliver water to the respective parties," it must necessarily be construed as a contract wherein, if any damage occurred thereunder to any

of the parties thereto, such party could maintain his suit for such damages without joining the other parties. Whether a contract is several or joint is a question of construction. Generally, where there are joint obligees the contract is joint. Where, however, the language of the contract requires the obligor to account to each of the obligees, respectively, or, by the use of any words, imports a separate right of action, the contract is several, and each obligee may sue thereon. *Lawless v. Lawless*, 39 Mo. App. 539; 17 Am. & Eng. Ency. of Law, 566. Joint-stock companies and unincorporated companies, as will be seen from the authorities *supra*, are generally treated as, and have all the attributes of, a common partnership, yet a mere joint ownership or community of interest in property does not necessarily constitute a partnership, though the income from it is divided. 17 Am. & Eng. Ency. of Law, p. 859. And even if the association of persons described as the party of the "second part" in the contract with the appellant do constitute a partnership, an obligor may render himself liable to each individual member of the partnership separately, as was done in the contract set out in the amended complaint. The objection that there was a nonjoinder of parties plaintiff is not, for the reasons above given, well taken, and the court below did not commit error in overruling it.

If the contract be construed as one for the delivery of so much water to each individual of the second part, and that each one could maintain an action thereon, without joining the others with him, for the damages he might have sustained, the complaint in this case fails to state a cause of action, for nowhere therein is it alleged that plaintiff ever requested defendant to deliver water to him at any place. It is not alleged that plaintiff did not get all the water he contracted for. It is alleged that defendant failed to deliver water on section 17 sufficient to raise a crop, but it does not appear from the contract that the water was to be delivered on that section. Defendant may have delivered it to plaintiff at some other point. It is further alleged that defendant did not deliver sufficient water. The quantity necessary to irrigate plaintiff's land is not stated in the complaint, nor is the quantity which the defendant did deliver stated, nor is the difference capable of being computed. It is nowhere stated in the contract on what land, or where, the water should be delivered by defendant.

The complaint states that the premises described therein, and on which it was claimed defendant failed to deliver the water, was a part of the premises upon which the water was to be delivered; and though the complaint states that it failed to deliver sufficient water upon that part to raise a crop for the cropping season of 1892-1893 (which the contract nowhere binds the defendant to do), it does not state that all the water plaintiff was entitled to receive from defendant was not delivered on the other part or parts of the premises. But if we construe the following allegation in the complaint: "And failed, neglected, and refused to deliver to said plaintiff, upon said premises (section 17), sufficient water to irrigate the crops growing upon said premises, when, during the crop-raising season of 1892-1893, there was flowing in said Salt River, at a point where the same could be diverted therefrom to said premises, water sufficient for said purpose," etc.,—into an allegation that there was such quantity of water in the river as contemplated there should be by the terms of the contract, yet the complaint further states that at periods of low water the defendant refused to deliver that amount of water which the Utah Canal would or could deliver to plaintiff if it (the Utah Canal) was in full control; but nowhere is there any allegation as to how much, or whether any quantity, could or would have been received by the plaintiff from said Utah Canal. A complaint that totally fails to state a breach of the contract sued on states no cause of action, and a failure to state a cause of action may be availed of by demurrer, by objection to evidence, by motion for judgment on the pleadings, by motion in arrest of judgment, or on motion for a new trial. This suit seems to have been prosecuted upon the theory that the defendant was bound, under the contract, to deliver sufficient water to plaintiff to raise a crop for the season named upon the land described in the complaint. While the contract was made, evidently, for the purpose of conferring the power of voting the shares on the question of assessment and distributing the water to the respective parties (share-owners) which flowed through the canal as a conduit the quantity of water which was to be distributed was the quantity which would flow through said conduit. This is nowhere alleged in said complaint, nor is it susceptible of being ascertained from the allegations thereof. In times of low water

in the river the defendant was only to secure the amount that would flow through said canal, and distribute that. If the defendant failed to distribute the water, he would be liable. And the shareholders could declare the contract forfeited, and take possession of their canal, if the same was in the possession of the defendant; and any party to such contract could recover his damages from the defendant for any breach while the contract was in force, if any occurred.

The general demurrer should have been sustained. Reversed, and new trial ordered, with directions to the court below to sustain the demurrer to the amended complaint.

Bethune, J., and Rouse, J., concur.

[Civil No. 506. Filed September 23, 1896.]

[46 Pac. 70.]

C. A. STEVENS et al., Defendants and Appellants, v.
ABIE E. WADLEIGH, Plaintiff and Appellee.

1. LANDLORD AND TENANT—IRRIGATION—LEASE—IRRIGATED LAND—RIGHT TO WATER INCIDENT—COVENANT FOR QUIET POSSESSION — LESSORS NOT LIABLE FOR FAILURE TO MAINTAIN DITCH.—When lands leased are arid, and at the time of the entering into the lease water to irrigate the same is received through a certain community ditch, owned by those having lands to be irrigated therefrom, and kept up and maintained by the landowners, each one being entitled to the proportion of water therefrom that his land bears to the whole number of acres irrigated, the lessee succeeds to the rights and obligations of the lessor in the use of such water, in the absence of special covenants, and for the term of the lease said interest in the water of said ditch attaches to the land. Under such lease, containing a covenant for the peaceable and quiet possession of said premises, the lessor is not liable to lessee for failure to maintain and repair such ditch when the head was washed out by floods in the river.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. Joseph D. Bethune, Judge. Affirmed.

The facts are stated in the opinion.

C. W. Wright, for Appellants.

Water that is used to irrigate land is appurtenant to the land, and passes with the land in the conveyance thereof. *Cave v. Crafts*, 53 Cal. 140; *Farmer v. Ukiah Water Co.*, 56 Cal. 12. The share of water in the Farmers' Ditch to which the leased land was entitled was leased with the land. At the time of the lease it was sufficient to insure two crops each year. The lease warrants to the lessee the quiet and peaceable possession of all this property for five years. Lessee had it for two years. He had no water during the year 1892, and because thereof lost all his crops. After the summer of 1892 he regained only two thirds of it. This two thirds was not sufficient for a summer crop. For this reason he abandoned the premises. The "enjoyment of the estate is the consideration for the covenant to pay rent, and when the lessee is deprived of the benefit he cannot be held to pay the compensation." *Stockwell v. Hunter*, 11 Met. 455; *Morse v. Goddard*, 13 Met. 179; *Royce v. Guggenheim*, 106 Mass. 202, 8 Am. Rep. 322; *Leishman v. White*, 1 Allen, 489; *Sherman v. Williams*, 113 Mass. 485, 18 Am. Rep. 522; *Dyett v. Pendleton*, 8 Cow. 728.

Frank H. Hereford, for Appellee.

A warrant of peaceable and quiet possession "relates only to the title, and not to the undisturbed enjoyment of the premises demised." *Playter v. Cunningham*, 21 Cal. 233; *Branger v. Manciet*, 30 Cal. 626; *Gazzolo v. Chambers*, 73 Ill. 75.

And a loss by accident of any portion of the demised premises does not rescind the lease, nor relieve the tenant of his obligation to pay rent, whether by fire, wind, or water. *Diamond v. Harris*, 33 Tex. 634; *Ely v. Ely*, 80 Ill. 532; *Beach v. Farish*, 4 Cal. 339; *Cowell v. Lumley*, 39 Cal. 152, 2 Am. Rep. 430; *Sheets v. Selden*, 6 Wall. 416; *Harrington v. Watson*, 11 Or. 143, 50 Am. Rep. 465, 3 Pac. 173; *Robinson v. Engle*, 13 Fla. 482.

The surrender of the premises by the tenant without the assent of the landlord does not release the tenant's liability for rent nor the tenant's sureties. *Livermore v. Eddy*, 33 Mo. 547; *McKensie v. Farrel*, 4 Bosw. 192.

ROUSE, J.—G. H. Wadleigh, on April 18, 1890, leased to C. A. Stevens certain lands in Pima County, for the full term of five years, for the sum of three thousand dollars, to be paid in installments of fifty dollars per month on the first day of each month, in advance; and for the faithful performance of the conditions of said lease on his part said Stevens executed a bond, in the sum of fifteen hundred dollars, with A. V. Grossette and W. S. Read as sureties. Said lease and bond were assigned to Abie E. Wadleigh, the appellee. The lands leased are arid, and water to irrigate the same was received through a certain ditch and its laterals, called the "Farmers' Ditch." Said ditch was what is commonly called a "community ditch." It was owned by those having lands to be irrigated by the water flowing through it, and was kept up and maintained by the labor of the landowners, each owner of the lands being entitled to a certain part of the water, in the proportion that the number of acres he owned bore to the number of acres watered from the said ditch. The lands leased were, at the date of the lease, entitled to that proportion of the water. The lease contained the following: "And the said lessor hereby agrees and binds himself, his executors and assigns and administrators, to warrant and defend the said lessee, his heirs, administrators, and assigns, in the peaceable and quiet possession of the said premises, and every part thereof, during the term of this lease; and in default thereof the said lessor . . . and assigns will and shall pay unto the said lessee . . . all damages that the said lessee shall sustain by the said failure to defend and warrant the said lease, not exceeding the sum [of] fifteen hundred (\$1,500) dollars. . . ." Stevens failing to pay the rent from and after the first day of March, 1893, in May, 1894, Mrs. Abie E. Wadleigh filed her complaint, as plaintiff, against Stevens and his sureties; A. V. Grossette and W. S. Read, on the said bond, for six hundred and fifty dollars, the amount of rent due on the first day of May, 1894. To the complaint defendants answered, and among other things said Stevens alleged, in effect, that plaintiff had failed to deliver the water to irrigate the lands. In consequence of such failure, he had lost one crop in 1892, and had been greatly damaged, and had to abandon said property, for the reason that he could get no water to irrigate said lands, and did abandon said premises in

March, 1893, and asked judgment for said damages in the sum of fifteen hundred dollars, for breach of the warranty of possession, as the amount fixed by the said part of the lease herein quoted. The case came on for trial before the court without a jury, and on the trial the evidence tended to show that the head of said ditch was washed out about July or August, in the summer of 1892, by floods in the Santa Cruz River, the stream from which the said Farmers' Ditch was supplied with water, and that no water flowed in said ditch from said river for about two months; that at the end of said period the head of said ditch was repaired, and about the same quantity of water that had previously flowed through said ditch was again obtained. There was no evidence that plaintiff or her assignor had performed any act or neglected any duty which caused the injury to the said ditch or diminished the quantity of water to which the lands leased by the defendant Stevens was entitled.

Under the allegations in the pleadings, the terms of the lease, and the facts adduced on the trial, we hold that the lease carried with it, for the term of the lease, all the water which could be obtained through the Farmers' Ditch, and that the lessee, by the terms of the lease, had for that period the same rights which the lessor would have had and was under the same obligations to pay for the use and distribution of the water, and to maintain said ditch for the period, as the lessor would have been had he remained in possession,—i. e. that the lessee for that period succeeded to all the rights and obligations that would have belonged to and rested upon the lessor, had he remained in possession; that, for the term of the lease, said interest in the water of said ditch attached to the lands, whether it be under the name of an "appurtenance," or under some other name or appellation. The part of the lease quoted was only a covenant of quiet enjoyment of the lands leased, since there was no eviction. The said covenant was to the extent only that the lessor had a good title, and could give a free, unencumbered lease for the time specified. 1 Washburn on Real Property, 3d ed., p. 428, sec. 2a; *Gazzolo v. Chambers*, 73 Ill. 75. Aside from an express covenant to that effect, a landlord is not bound to keep the leased premises in repair, nor is he responsible in damages to his tenant for injuries resulting to the latter from the non-repairs

of the leased premises. *Ward v. Fagin*, 101 Mo. 669, 14 S. W. 738; *Peterson v. Smart*, 70 Mo. 38; *Brewster v. De Fremery*, 33 Cal. 341. And a loss by accident of any portion of the leased premises does not rescind the lease nor relieve the tenant of his obligation to pay the rent. *Ely v. Ely*, 80 Ill. 532; *Sheets v. Selden*, 7 Wall. 416. The evidence disclosed the further fact that Stevens wrote a number of letters to Wadleigh, after March 1, 1893, of different dates, the last one as late as September or October, 1893. In all of said letters, while there was a declaration that Stevens had moved off the leased lands, yet he stated that he had a family residing thereon, and made mention in glowing terms of the bountiful crops of grain and hay he had growing on said lands. Aside from the matters above mentioned, said letters contained promises to pay the amount of rent due, the dates of payment being fixed at some date not long subsequent to the dates of the respective letters, and also contained excuses for failing to pay the amounts due at the dates fixed in preceding letters. From these letters, and other facts in evidence, the court was justified in finding that the premises were not abandoned at the time Stevens claimed he abandoned the property. We further hold that Stevens could not, under the terms of said lease, abandon said lands, and escape the liability for the rent. The judgment should be affirmed, and it is so ordered.

Baker, C. J., and Hawkins, J., concur.

[Civil No. 500. Filed September 23, 1896.]

[46 Pac. 72.]

JOHN LAWLER et al., Defendants and Appellants, v. THE
BASHFORD-BURMISTER COMPANY, Plaintiff and
Appellee.

1. ATTACHMENT—CLAIM BY THIRD PARTY—TRIAL—ISSUES—DEFAULT—
REV. STATS. ARIZ. 1887, CHAP. 2, TIT. 61, CONSTRUED.—Chapter 2 of
title 61, *supra*, provides that when a party claims property levied
upon by a sheriff, by making a certain affidavit and executing a

certain bond, the sheriff shall deliver the property to the claimant and return said affidavit and bond to the proper court, and the clerk thereof shall docket the case in the name of the plaintiff in the writ as plaintiff and the claimant of the property as defendant; that at the first term thereafter the court shall direct an issue to be made up in writing between the parties, if they both appear, which shall be tried as in other cases. Paragraph 3178 of said chapter, *supra*, provides: "Said issue shall consist of a brief statement of the authority and right by which the plaintiff seeks to subject the property levied on to his execution, and the nature of the claim of the defendant thereto." Where both plaintiff in attachment and claimant appeared and, under direction of the court, the plaintiff filed a complaint in compliance with the statute, *supra*, and the court and both parties treated such complaint and the affidavit filed by claimant and returned by sheriff as sufficiently raising an issue, and thereupon the case was set for trial, the affidavit and bond filed by defendant was a sufficient appearance, in conjunction with the conduct of the court and parties, to prevent a judgment by default until defendant had been ordered to present some other issue, and had, after a sufficient time to comply with such order, failed so to do, and, under the circumstances, it was error for the trial court to deny defendant's motion, made before judgment rendered, for leave to file an answer, and enter judgment by default against defendant.

2. ~~SAME—SAME—JUDGMENT BY DEFAULT—MOTION TO SET ASIDE—LEAVE TO ANSWER.~~—Where, immediately after judgment was pronounced, defendant files his petition, supported by affidavit, praying for an order setting aside the judgment, and for leave to file an answer, tendering therewith the answer containing allegations showing a meritorious defense, it is error for the court to refuse to set aside the judgment and allow the defendant to plead.
3. ~~SAME—SAME—SAME—SAME—SAME—APPEAL AND ERROR—REVIEWED FOR ABUSE OF DISCRETION—SHOWING.~~—Before an appellate court will disturb a judgment by default, it should be made to appear that the trial court failed to act with proper discretion. Two things in such cases must appear,—viz., that the defendant has a meritorious defense, and a good reason for not answering in time, or making his defense on the trial.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Yavapai. Joseph D. Bethune, Acting Judge. Reversed.

Statement of facts:—

The appellee, the Bashford-Burmister Company, commenced an action in September, 1893, in the district court of Yavapai County, against the Seven Stars Gold-Mining Com-

pany, to recover something over five thousand dollars. An attachment in aid of said suit was duly issued, and the writ of attachment delivered to the sheriff of said county, who levied it on certain property, as the personal property of said gold-mining company. Thereafter, in November, 1893, a judgment was rendered in said case in favor of said Bashford-Burmister Company for the said amount claimed. Thereafter, on the twenty-sixth day of December, 1893, the appellants, Lawler & Wells, made and presented an affidavit to said sheriff, claiming the said property which had been levied upon under said writ of attachment as their property, and said sheriff appraised the said property, and said Lawler & Wells executed a bond as required by law; and said property was then turned over to them by said sheriff, and thereafter he filed said affidavit and bond of Lawler & Wells in said district court on December 29, 1893, as required by law. At the June term of said court, and on the 5th of said month, on motion of Lawler & Wells's attorney, said case (the controversy between Lawler & Wells and the Bashford-Burmister Company over said property), on said affidavit, was ordered placed on the calendar, and said Bashford-Burmister Company ordered to tender issues as required by law. Thereafter, on June 22, 1893, said Bashford-Burmister Company complied with said order, and filed a complaint or statement, as plaintiff, against Lawler & Wells, as defendants, therein setting up the fact of its suit against the said Seven Stars Gold-Mining Company; its judgment for the said amount thereon; its attachment in aid thereof; the levy of said writ of attachment on certain property, claimed to be property of said Seven Stars Gold-Mining Company; the fact that defendants Lawler & Wells filed their affidavit claiming said property, and executed their bond therefor; that said property, after said affidavit was made and bond was executed, was delivered to them; with the declaration, in effect, that said defendant the Seven Stars Gold-Mining Company at the time said attachment was levied was the owner of said personal property,—which complaint or statement was filed as its tender of issues. Thereafter the case was set for trial, and reset for trial, on the motion of the respective parties, from time to time, and passed until July 11, 1895, on which date Judge Hawkins made an order that said case be referred

to Hon. J. D. Bethune for trial. Thereafter, on July 17, 1895, on motion of said defendants Lawler & Wells, the case was set for trial on July 22, 1895; and on said last date both parties were present in court, in person and with their counsel, and announced ready for trial on the issues presented, whereupon said plaintiff moved for a judgment against defendants by default. Defendants resisted said motion, contending that the affidavit and bond filed on their claim of said property made an issue to be tried; informed the court that they had filed a contract in writing, which had been given them by the Seven Stars Gold-Mining Company, which was a conditional sale of said property to said company, and had given written notice of said filing to plaintiff; that at a previous date Judge Hawkins had decided from the bench that the issues were joined,—and requested that defendants be granted a few minutes to prepare and file issues on their part. The court refused defendants' request, and sustained plaintiff's motion, and gave judgment against defendants for the value of said property, on said bond, with damages and costs. Defendants duly excepted to the rulings of the court, and moved to set aside said judgment by default, and for a new trial, and tendered with said motion a meritorious defense,—among other things, to the effect that defendants had made a conditional sale in writing of the said property to said Seven Stars Gold-Mining Company, that the conditions had failed, and that said property, in consequence of said failure, was the property of defendants. Said motions to set aside said judgment, and for leave to file said answer, were overruled and denied, and defendants excepted and appealed.

J. F. Wilson, for Appellants.

Default could not be properly entered, because the parties were in court, were at issue on a dispute of title, and announcing ready to try that issue. *Field & Co. v. Fowler*, 62 Tex. 65. This case holds, "That the appearance of the defendant entered upon the minutes of the court, whether made in person or by attorney, had all the effect of an answer in preventing a judgment by default, until he [the defendant] *refuses* to join issue under the direction of the court. And it reversed the judgment entered by default, notwithstanding the defendant was not there at the time, and his attorney had

withdrawn from the case when it was entered, simply because defendant's appearance was entered on the minutes and he had not refused to obey the order of the court,"

"The power of courts should be liberally exercised to mold and direct proceedings so as to dispose of cases upon their merits, and without reasonable delay, regarding mere technicalities as obstacles to be avoided rather than as principles to which effect is to be given in derogation of substantial rights." *Buell v. Emerich*, 85 Cal. 116, 24 Pac. 644; *Reed v. Calderwood*, 22 Cal. 465; *Casement v. Ringgold*, 28 Cal. 338; *Roland v. Craenhagan*, 18 Cal. 455; *Burns v. Scooffy*, 98 Cal. 271, 33 Pac. 86.

In *Tennison v. Tennison*, 49 Mo. 110, it is decided that an appearance and offer to file answer in obedience to a former order of court was such a technical appearance as would give defendant the right to open up the judgment by default, if properly moved. See, also, *Ratliff v. Baldwin*, 29 Ind. 16, 92 Am. Dec. 330; *Cruise v. Cunningham*, 79 Ind. 402; *Clary v. Hoagland*, 6 Cal. 685.

In this case the court, in response to an inquiry made by appellants, informed them they had pleaded sufficiently. Later a different judge in the same court says differently, and refuses to allow us to plead, and enters up a default. This was misleading. On this phase of the subject, see *Wicke v. Lake*, 21 Wis. 410, 94 Am. Dec. 552.

As to excuses for opening a default, see *Mann v. Provost*, 3 Abb. Pr. 446; *Mead v. Norris*, 21 Wis. 310; *McGuin v. Case*, 9 Abb. Pr. 160; *State v. Mining Co.* 13 Nev. 195; *Howe v. Goldman*, 4 Nev. 195; *Wolff v. Canadian Ry. Co.*, 89 Cal. 332, 26 Pac. 825; *Watson v. Railway Co.*, 41 Cal. 17.

That it was a clear abuse of discretion for the court to refuse to set aside the default, see *Lodtman v. Schluter*, 71 Cal. 97, 16 Pac. 540; *Watson v. Railway Co.*, 41 Cal. 17; *Riedy v. Scott*, 53 Cal. 73.

Johnston & Sloan, and Herndon & Norris, for Appellee.

ROUSE, J. (after stating the facts).—The first thing for us to determine in this case is, Was there a default on the part of defendants Lawler & Wells at the time the motion for judgment was made? The term "default," when used in

practice, is defined by Bouvier to be "the non-appearance of a plaintiff or defendant at court within the time prescribed by law to prosecute his claim or make his defense." 1 Bouvier's Law Dictionary, 445. The record shows that defendants were in court, and active in trying to bring the case to trial; that they had filed in court the written evidence of their title to said property, and had given plaintiff notice thereof. Hence, under said definition, they were not in default. The term, when applied to a defendant, is frequently (and indeed commonly) used in a much wider sense; and a failure to enter a plea, answer, affidavit of defense, etc., as well as for want of an appearance, is included in the definition thereof. 1 Black on Judgments, sec. 80. If there was an appearance on the part of defendants, as above defined, there was no default in this case, and the motion for judgment should have been overruled.

Chapter 2 of title 61 of the Revised Statutes provides that when a party claims property levied upon by a sheriff, by making a certain affidavit and executing a certain bond, the sheriff shall deliver the property to the claimant, and the sheriff shall return said affidavit and bond to the proper court, and the clerk thereof shall docket the case in the name of the plaintiff in the writ as plaintiff, and the claimant of the property as defendant; that at the first term thereafter the court shall direct an issue to be made up in writing between the parties, if they both appear, which shall be tried as in other cases. As both parties appeared in this case, it became the duty of the court to direct that an issue be formed. The judge then on the bench did order such issue to be made, and plaintiff did file a complaint or statement for that purpose on its part. Paragraph 3178 of the chapter of the statutes above referred to is as follows: "Said issue shall consist of a brief statement of the authority and right by which the plaintiff seeks to subject the property levied on to his execution, and the nature of the claim of the defendant thereto." The complaint or statement filed by plaintiff substantially complied with said paragraph. Defendants filed no defense on their part, but acted as though the affidavit they had made and the bond which they had executed, and which had been filed by the sheriff in said court, was sufficient to present the issues on their part. Indeed, the judge then on the bench

seemed to consider those papers as sufficient to present all the issues necessary for a trial; and both parties, by having the case set for trial from time to time thereafter, appeared to join in that conclusion. We do not feel compelled, in this case, to determine what steps should be taken by the respective parties in cases such as this, in order to form an issue or to determine the nature of the pleadings which should be filed by them. What would be necessary in one case might not be necessary or sufficient in another. But we think the affidavit and bond made and executed by the defendants were such an appearance on their part, and the conduct of the parties in trying to bring the case to trial, and the remarks of the trial judge with reference to the issue, were sufficient to prevent a judgment by default until defendants had been ordered to present some other issue, and had failed to comply, after having had sufficient time to comply with such order. 1 Black on Judgments, sec. 36; *Norman v. Hooker*, 35 Mo. 366; *Ruch v. Jones*, 33 Mo. 393; *Mullen v. Wine*, 9 Colo. 167, 11 Pac. 54.

Before the judgment was rendered defendants asked the court to grant them a few minutes only in which to draft and file an answer, at the same time advising the court of the views expressed by the former judge with reference to the pleadings. Said request was refused, and we think the court erred in that respect.

Immediately after the judgment was pronounced defendants filed their petition, supported by affidavit, praying for an order setting aside the judgment, and for leave to file an answer, tendering therewith an answer containing allegations showing a meritorious defense, which they offered with said petition, and asked to file. In said petition they set out the rulings or declarations of the former judge with reference to the pleadings, and gave a full history of the case, and of the motions made in court by the respective parties, and steps taken by them to bring the case to trial. Before an appellate court will disturb a judgment by default, it should be made to appear that the trial court had failed to act with proper discretion. Two things in such cases must appear,—viz., that the defendant has a meritorious defense, and a good reason for not answering in time, or making his defense on the trial. *Robyn v. Publishing Co.* 127 Mo. 385, 30 S. W. 130; *Pry v. Railroad Co.*, 73 Mo. 123; *Judah v. Hogan*, 67 Mo.

252; 1 Black on Judgments, secs. 347, 348; *Harding v. Cowing*, 28 Cal. 212; *Wallace v. Eldredge*, 27 Cal. 495. The defendants, by their petition to set aside the judgment in this case, having shown that they had a meritorious defense and a good reason for not filing an answer in time, the judgment by default should have been set aside, and defendants allowed to plead. The judgment of the district court is reversed, and the case remanded for a new trial.

Baker, C. J., concurs.

Hawkins, J., took no part in this case.

MEMORANDUM DECISIONS.

[Civil No. 513.]

ANNIE CADMAN, Plaintiff in Error, v. THE OLD DOMINION COPPER COMPANY, Defendant in Error.

ERROR to District Court of the Second Judicial District in and for the County of Gila. O. T. Rouse, Judge.

Barnes & Martin, for Plaintiff in Error.

Fitch & Campbell, for Defendant in Error.

January 15, 1896. Dismissed.

[Civil No. 525.]

H. OHUICK, Appellant, v. M. H. SHERMAN, Appellee.

APPEAL from the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge.

Kibbey & Williams, for Appellant.

C. F. Ainsworth, for Appellee.

January 16, 1896. Affirmed.

[Civil No. 524.]

WILLIAM A. HANCOCK et al., Appellants, v. THOMAS W. PEMBERTON, Appellee.

APPEAL from the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge.

No appearance for Appellants.

C. F. Ainsworth, for Appellee.

January 16, 1896. Affirmed.

[Civil No. 475.]

GILA COUNTY, Appellant, v. J. H. THOMPSON, Appellee.

APPEAL from the District Court of the Second Judicial District in and for the County of Gila. Owen T. Rouse, Judge.

J. W. Wentworth, and Kibbey & Williams, for Appellant.

E. J. Edwards, for Appellee.

January 16, 1896. Dismissed.

[Civil No. 476.]

GILA COUNTY, Appellant, v. J. H. THOMPSON, Appellee.

APPEAL from the District Court of the Second Judicial District in and for the County of Gila. Owen T. Rouse, Judge.

J. W. Wentworth, and Kibbey & Williams, for Appellant.

Peter T. Robertson, for Appellee.

January 16, 1896. Dismissed.

[Criminal No. 106.]

In the Matter of the Petition of O. A. TURNEY for a Writ of Habeas Corpus, Petitioner, v. THE CITY OF PHOENIX in the Territory of Arizona, Respondent.

Thomas Armstrong, Jr., for Petitioner.

Pierce Evans, for Respondent.

January 16, 1896. Denied.

[Civil No. 520.]

T. C. JORDAN, Appellant, v. MARICOPA COUNTY, Appellee.

APPEAL from the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker Judge.

Kibbey & Williams, for Appellant.

Jerry Millay, District Attorney, for Appellee.

January 17, 1896. Dismissed.

[Civil No. 496.]

C. B. KELTON, Appellant, v. COLIN CAMERON, Appellee.

APPEAL from the District Court of the First Judicial District in and for the County of Pima. J. D. Bethune, Judge.

Barnes & Martin, for Appellant.

Rochester Ford, for Appellee.

January 17, 1896. Dismissed.

[Civil No. 498.]

J. S. WILLIAMS et al., Appellants, v. COCHISE COUNTY, Appellee.

APPEAL from the District Court of the First Judicial District in and for the County of Cochise. J. D. Bethune, Judge.

James Reilly, and M. A. Smith, for Appellants.

Thomas D. Satterwhite, Attorney-General, Charles A. Clark, and G. W. Swain, for Appellee.

January 18, 1896. Affirmed.

[Civil No. 516.]

THE COUNTY OF COCHISE, Appellant, v. THE BOARD
OF SUPERVISORS OF COCHISE COUNTY, Ap-
pellee.

APPEAL from the District Court of the First Judicial
District in and for the County of Cochise. J. D. Bethune,
Judge.

G. W. Swain, for Appellant.

Charles S. Clark, for Appellee.

January 18, 1896. Affirmed.

[Criminal No. 95.]

S. B. WISSINGER, Appellant, v. THE TERRITORY OF
ARIZONA, Respondent.

APPEAL from the District Court of the Fourth Judicial
District in and for the County of Apache. John J. Hawkins,
Judge.

J. F. Wilson, and Robert E. Morrison, for Appellant.

Thomas D. Satterwhite, Attorney-General, and T. G.
Norris, for Appellee.

January 18, 1896. Affirmed.

[Civil No. 450.]

THE NORTHWESTERN NATIONAL BANK et al., Ap-
pellants, v. B. M. FREEMAN et al., Appellees.

APPEAL from the District Court of the Fourth Judicial
District in and for the County of Coconino. John J. Hawkins,
Judge.

Affirmed, 171 U. S. 620, 43 L. Ed. 307, 19 Sup. Ct. 36.

Herndon & Norris, and E. E. Ellinwood, for Appellants.

H. Z. Zuck, and C. E. & F. Herrington, for Appellees.

January 18, 1896. Affirmed.

[Criminal No. 110.]

NICK BOOTH, Appellant, v. THE TERRITORY OF ARIZONA, Respondent.

APPEAL from the District Court of the Second Judicial District in and for the County of Gila. O. T. Rouse, Judge.

E. J. Edwards, for Appellant.

Thomas D. Satterwhite, Attorney-General, for Respondent.

January 18, 1896. Affirmed.

[Civil No. 529.]

C. A. LUKE, Appellant, v. JOHN ALLEN, Appellee.

APPEAL from the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge.

No appearance for Appellant.

Pierce Evans, for Appellee.

January 18, 1896. Affirmed.

[Civil No. 458.]

THOMAS D. SATTERWHITE, Appellant, v. PIMA COUNTY, Appellee.

APPEAL from the District Court of the First Judicial District in and for the County of Pima. J. D. Bethune, Judge.

Rochester Ford, for Appellant.

Charles W. Wright, for Appellee.

January 20, 1896. Affirmed.

[Civil No. 455.]

W. H. LINN et al., Plaintiffs and Appellees, v. GILA BEND RESERVOIR AND IRRIGATION COMPANY, a Corporation, Defendant and Appellant.

APPEAL from the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge.

W. H. Barnes, Joseph C. Perry, and J. B. Woodward, for Appellant.

Millay & Bennett, C. F. Ainsworth, and Thomas Armstrong, Jr., for Appellees.

January 20, 1896. Affirmed.

[Civil No. 428.]

ARNOLD GOLD AND SILVER MINING COMPANY et al., Plaintiffs in Error, v. L. O. COWAN, Defendant in Error.

ERROR to the District Court of the Fourth Judicial District in and for the County of Mohave. John J. Hawkins, Judge.

Carran & Pillsbury, for Plaintiffs.

J. H. Wright, for Defendant.

January 21, 1896. Affirmed.

[Civil No. 471.]

ROCHESTER FORD et al., Appellants, v. TERRITORY OF ARIZONA, Appellee.

APPEAL from the District Court of the First Judicial District in and for the County of Pima. J. D. Bethune, Judge.

Rochester Ford, *pro se*, and S. M. Franklin, for Appellants.

Thomas D. Satterwhite, Attorney-General, for Appellee.

January 21, 1896. Affirmed.

February 12, 1896. Modified.

[Civil No. 499.]

GEORGE W. BRYAN, Appellant, v. COCHISE COUNTY,
Appellee.

APPEAL from the District Court of the First Judicial
District in and for the County of Cochise. J. D. Bethune,
Judge.

James Reilly, for Appellant.

George W. Swain, for Appellee.

January 21, 1896. Affirmed.

[Civil No. 454.]

ALBERT STEINFELD et al., Appellants, v. WILLIAM F.
OVERTON et al., Appellees.

APPEAL from the District Court of the First Judicial
District in and for the County of Pima. J. D. Bethune,
Judge.

S. M. Franklin, for Appellants.

Thomas D. Satterwhite, for Appellees.

January 22, 1896. Reversed.

[Civil No. 459.]

H. S. WATTON, Appellee, v. J. J. COTTRELL, Surviving
Partner of the Firm of J. J. Cottrell & Co., et al., Ap-
pellants.

APPEAL from the District Court of the Third Judicial
District in and for the County of Maricopa. A. C. Baker,
Judge.

C. F. Ainsworth, for Appellants.

Millay & Bennett, for Appellee.

January 22, 1896. Affirmed.

[Civil No. 497.]

C. A. GACTJEUS v. PETER HENDERSON.

APPEAL from the District Court of the First Judicial District in and for the County of Cochise. J. D. Bethune, Judge.

Allen R. English, for Appellant.

William Herring, for Appellee.

January 21, 1896. Affirmed.

[Civil No. 511.]

T. W. OTIS, Appellant, v. THE CITY OF PRESCOTT,
Appellee.

APPEAL from the District Court of the Fourth Judicial District in and for the County of Yavapai. John J. Hawkins, Judge.

Johnson & Sloan, and E. W. Sanford, for Appellant.

J. F. Wilson, for Appellee.

January 22, 1896. Affirmed.

[Criminal No. 109.]

JESUS LARES, Appellant, v. THE TERRITORY OF ARIZONA, Respondent.

APPEAL from the District Court of the Second Judicial District in and for the County of Pinal. O. T. Rouse, Judge.

J. S. Sniffen, for Appellant.

F. M. Doan, and A. S. Humphries, for Respondent.

January 24, 1896. Affirmed.

[Civil No. 483.]

THE SALT RIVER VALLEY GOLD MINING COMPANY et al., Appellants, v. JAMES B. NORTON et al., Appellees.

APPEAL from the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge.

C. F. Ainsworth, for Appellants.

Alexander & Stilwell, for Appellees.

February 14, 1896. Affirmed.

[Criminal No. 114.]

JOHN O. DUNBAR, Defendant and Appellant, v. THE TERRITORY OF ARIZONA, Plaintiff and Respondent.

APPEAL from the District Court of the First Judicial District in and for the County of Pima. J. D. Bethune, Judge.

Mark A. Smith, and W. H. Barnes, for Appellant.

Thomas D. Satterwhite, Attorney-General, for Respondent.

May 5, 1896. Reversed.

[Civil No. 487.]

THE REPUBLICAN PUBLISHING COMPANY, Appellant, v. WILLIAM H. GILL, Appellee.

APPEAL from the District Court of the First Judicial District in and for the County of Pima. J. D. Bethune, Judge.

Barnes & Martin, and Clark Churchill, for Appellant.

S. M. Franklin, for Appellee.

May 4, 1896. Affirmed.

[Civil No. 504.]

GEORGE H. FITTS, Appellant, v. THE MAYOR AND
COMMON COUNCIL OF THE CITY OF TOMB-
STONE, TERRITORY OF ARIZONA, Appellees.

APPEAL from the District Court of the First Judicial
District in and for the County of Cochise. J. D. Bethune,
Judge.

Allen R. English, for Appellant.

G. W. Swain, and C. S. Clark, for Appellees.

May 4, 1896. Affirmed.

[Criminal No. 112.]

LAWRENCE M. LEMON, Appellant, v. THE TERRITORY
OF ARIZONA, Respondent.

APPEAL from the District Court of the First Judicial
District in and for the County of Pima. J. D. Bethune,
Judge.

Barnes & Martin, and Charles Blenman, for Appellant.

Thomas D. Satterwhite, Attorney-General, and William M.
Lovell, for Respondent.

May 4, 1896. Affirmed.

[Civil No. 510.]

T. F. MILLER et al., Appellants, v. JOHN A. WEBB, Ap-
pellee.

APPEAL from the District Court of the Fourth Judicial
District in and for the County of Yavapai. John J. Hawkins,
Judge.

Herndon & Norris, for Appellants.

J. F. Wilson, for Appellee.

May 4, 1896. Affirmed.

[Civil No. 494.]

A. BAUER et al., Appellants, v. EGID WAGNER et al.,
Appellees.

APPEAL from the District Court of the First Judicial
District in and for the County of Cochise. J. D. Bethune,
Judge.

Charles S. Clark, for Appellants.

A. R. English, for Appellees.

May 4, 1896. Affirmed.

[Civil No. 521.]

P. T. BURTIS, Appellant, v. ROBERT FAULKNER et al.,
Appellees.

APPEAL from the District Court of the Third Judicial
District in and for the County of Maricopa. A. C. Baker,
Judge.

Damron & Crenshaw, for Appellant.

Millay & Bennett, for Appellees.

May 4, 1896. Affirmed.

[Civil No. 503.]

JOHN SROUFE et al., Appellants, v. P. W. SMITH, Ap-
pellee.

APPEAL from the District Court of the First Judicial
District in and for the County of Cochise. J. D. Bethune,
Judge.

Barnes & Martin, for Appellants.

William Herring and Sarah I. Herring (of Counsel), for
Appellee.

May 5, 1896. Reversed.

[Civil No. 526.]

PINAL COUNTY, Appellant, v. J. J. FRASER, Appellee.

APPEAL from the District Court of the Second Judicial District in and for the County of Pinal. Owen T. Rouse, Judge.

Fletcher M. Doan, and C. W. Wright, for Appellant.

J. S. Sniffen, and E. J. Edwards, for Appellee.

May 5, 1896. Affirmed.

[Civil No. 527.]

PINAL COUNTY, Appellant, v. THOMAS F. WEEDIN,
Clerk of District Court, Appellee.

APPEAL from the District Court of the Second Judicial District in and for the County of Pinal. Owen T. Rouse, Judge.

Fletcher M. Doan, for Appellant.

Edwards & Lovell, for Appellee.

May 5, 1896. Affirmed.

[Civil No. 528.]

PINAL COUNTY, Appellant, v. THOMAS F. WEEDIN,
Clerk of District Court, Appellee.

APPEAL from the District Court of the Second Judicial District in and for the County of Pinal. Owen T. Rouse, Judge.

Fletcher M. Doan, for Appellant.

Edwards & Lovell, for Appellee.

May 5, 1896. Affirmed.

[Civil No. 437.]

R. T. ROOT, Defendant and Appellant, **v. HARLEY FAY**,
Plaintiff and Appellee.

APPEAL from the District Court of the Fourth Judicial District in and for the County of Mohave. **John J. Hawkins**, Judge.

Herndon & Norris, for Appellant.

Stewart & Doe, and **J. C. Campbell**, for Appellee.

May 5, 1896. Judgment of January 18, 1896, modified so that said case be remanded for a new trial. See opinion, *ante*, p. 19.

[Civil No. 445.]

G. W. SEAVERNS and **QUINCY A. SHAW**, Appellants,
v. MICHAEL WELCH, Appellee.

APPEAL from the District Court of the First Judicial District in and for the County of Cochise. **J. D. Bethune**, Judge.

William Herring, and **Sarah I. Herring** (of Counsel), for Appellants.

W. H. Stilwell, for Appellee.

January 18, 1896. Reversed.

May 5, 1896. Judgment of January 18, 1896, modified so that said case be remanded for a new trial.

[Civil No. 532.]

In the Matter of the Application of **JAKE MARKS** for a Writ of Mandamus, Petitioner, **v. B. J. FRANKLIN et al.**, Respondents.

ORIGINAL APPLICATION for Writ of Mandamus.

W. H. Stilwell, for Petitioner.

Thomas D. Satterwhite, for Respondents.

May 5, 1896. Dismissed.

[Criminal No. 108.]

THE TERRITORY OF ARIZONA, Respondent, v. FRANS
OSCAR TORREN, Appellant.

APPEAL from the District Court of the Second Judicial
District in and for the County of Pinal. O. T. Rouse, Judge.

Blenman & Davis, E. J. Edwards (of Counsel), for Appel-
lant.

Thomas D. Satterwhite, Attorney-General, F. M. Doan,
Frank Cox, and W. R. Stone, for Respondent.

June 22, 1896. Affirmed.

[Criminal No. 113.]

WILLIAM SCHULTZ et al., Appellants, v. THE TERRI-
TORY OF ARIZONA, Respondent.

APPEAL from the District Court of the Fourth Judicial
District in and for the County of Yavapai. J. J. Hawkins,
Judge.

R. E. Sloan, for Appellants.

John F. Wilson, Attorney-General, and R. E. Morrison,
for Respondent.

October 1, 1896. Reversed.

[Civil No. 509.]

THE NEW YORK LIFE INSURANCE COMPANY, Ap-
pellant, v. LENA PEREZ, Administratrix, et al., Ap-
pellees.

APPEAL from the District Court of the Fourth Judicial
District in and for the County of Apache. John J. Hawkins,
Judge.

J. F. Wilson, for Appellant.

Herndon & Norris, for Appellees.

October 1, 1896. Reversed.

[Criminal No. 111.]

GUS MUDUSBACH, Appellant, v. THE TERRITORY OF
ARIZONA, Respondent.

APPEAL from the District Court of the Fourth Judicial
District in and for the County of Coconino. John J. Haw-
kins, Judge.

E. S. Clark, Herndon & Norris, and E. S. Cosney, for Ap-
pellant.

John F. Wilson, Attorney-General, J. E. Jones, and T. S.
Bunch, for Respondent.

October 2, 1896. Reversed.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
TERRITORY OF ARIZONA
DURING THE YEAR 1897.

[Civil No. 515. Filed March 9, 1897.]

F. M. CZARNOWSKI, Plaintiff and Appellant, v. JOE HOLLAND, Defendant and Appellee.

1. **BROKERS—REAL ESTATE AGENT—ACTION FOR COMMISSION—EVIDENCE—FINANCIAL RESPONSIBILITY OF PURCHASER.**—In an action to recover commission for services in selling real estate, it is error to exclude evidence of the financial responsibility of the buyer. Before a broker can be said to have earned a commission it must be shown that he produced a purchaser who was ready and willing to make the purchase on terms satisfactory to his employer.
2. **SAME—SAME—CONTRACT—CONSTRUCTION.**—A contract authorizing a real estate agent to negotiate for the sale of property "and to receipt for a deposit on such sale, . . . the price to be \$5,000 or such lower figure as you may agree to accept," is not to be construed as requiring a sale for cash alone.
3. **CONTRACTS—CONSTRUCTION.**—Where a contract admits of two constructions, one of which nullifies the contract and the other upholds it, the former must be discarded and the latter adopted where it appears that the contract is reasonable and effects no injury to either party.
4. **SAME—SAME—IMPLICATIONS—CONFORMITY TO USAGE.**—Stipulations which are necessary to make a contract reasonable and conformable to usage are implied with respect to matters concerning which the contract manifests no contrary intention.
5. **BROKERS—REAL ESTATE AGENT—ACTION FOR COMMISSION—EVIDENCE—QUANTUM MERUIT—NECESSITY FOR WRITTEN CONTRACT.**—In an action by a real estate agent for commission, it is error to exclude evidence of a written contract for such commission though the trial court offered to allow the plaintiff to prove the value of his services in selling the lots in question. To entitle the broker to recover commissions for effecting a sale of real estate, it is indispensable that he should show that he was employed by the owner to make the sale, and this employment must be in writing.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge. Reversed.

The facts are stated in the opinion.

William H. Stilwell, for Appellant.

Fitch & Campbell, for Appellee.

BETHUNE, J.—This is an action brought by plaintiff and appellant against the defendant and appellee for two hundred and fifty dollars commission alleged to be due appellant for services performed as real-estate agent in the sale of lots 1, 2, and 3, block 20, city of Phoenix, October 6, 1893.

This action is based upon the following agreement in writing executed by defendant:—

“PHOENIX, ARIZONA, October 4th, 1893.

“F. M. CZARNOWSKI. You are hereby authorized and empowered to negotiate for the sale of the following described property, and to receipt for a deposit on such sale: Lots 1, 2, and 3, block 20, in the city of Phoenix, Maricopa County, Arizona Territory; the price to be five thousand dollars or such lower figures as you may agree to accept, the undersigned to furnish a good and sufficient conveyance free of all encumbrance, together with abstract of title, the property to remain in your hands exclusively for twenty days, and thereafter until withdrawn by verbal or written notice. If sale is made within twenty days from date or thereafter before withdrawal, will pay you five per cent commission, in consideration of which you are to make every reasonable effort to effect such sale.

JOSEPH H. HOLLAND.”

At the trial it was shown that plaintiff had negotiated a sale of the property for the sum mentioned in the agreement, five thousand dollars, with one Thomas Smith, and had received a check of a thousand dollars on the Valley Bank and an agreement from Smith to pay fifteen hundred dollars on the first of the month, with the reservation of the right to pay the balance as soon as the title was all right. The check was made payable to the defendant Holland, and the terms of sale immediately made known to him by the plaintiff, to which

terms defendant acceded, and remarked: "Now I will go back to the old country on that five thousand dollars, and I will then live like a prince, but over here I had to scratch around to get money enough to live on." On the next day defendant came to plaintiff and said: "I made a mistake. I did n't mean to sell those lots for five thousand dollars, but I meant for five thousand dollars a lot," and thereupon repudiated the entire transaction, and expressly declared that he would pay no commission on the sale.

At the trial the contract was introduced in evidence, and construed to mean that the sale of the property must be entirely for cash, and upon proof of the terms as shown to have been agreed to by the defendant it was, on motion of defendant, excluded, as not tending to prove the sale, and the jury were instructed not to consider it, and further instructed that the defendant was entitled to a verdict, and advised them to find for the defendant. The court also, before so instructing the jury, offered to allow the plaintiff to prove a *quantum meruit*; that is, the value of his services in selling the lots in question, which plaintiff declined to do, and thereupon the jury in obedience to the instructions of the court found a verdict for the defendant.

The first error relied upon by the plaintiff is the refusal of the court to allow plaintiff to prove the financial responsibility of Thomas Smith, the buyer of the land. The following questions were propounded to, and answers made by, the plaintiff:—

"Q. What do you know of his [Thomas Smith's] financial responsibility?

"*Mr. Campbell.*—We object to that, as immaterial to the issues in this case.

"*Mr. Stilwell.*—If the court please, we desire to show that this man Smith was not only willing but able to take this property and carry out the contract at the purchase price.

"*By the Court.*—I will sustain the objection."

To which ruling plaintiff excepted.

This was error. "Before a broker can be said to have earned his commission, it must also be shown that he produced a purchaser who was ready and willing to make the purchase on terms satisfactory to his employer." *McGavock v. Woodlief*, 20 How. 221, 15 L. Ed. 884; *Wylie v. Marine National Bank*,

61 N. Y. 415; *Zeimer v. Anticell*, 75 Cal. 509, 17 Pac. 642; *Neiderlander v. Starr*, 50 Kan. 770, 33 Pac. 592; *Francis v. Baker*, 45 Minn. 83, 47 N. W. 452.

We think it is also error for the court to strike out the contract. We do not think there was manifested by the terms of the contract an intention that the purchase price should be solely for cash. Even if it were, the consent of the defendant to the modifications made would not vitiate or annul the contract, but, acting upon the well-known principle that a contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties, and, in case of uncertainty, the language of a contract should be interpreted more strongly against the party who caused the uncertainty to exist, the contract should receive such interpretation. The promisor is presumed to be such party. Where a contract admits of two constructions, one of which nullifies the contract and the other upholds it, the former must be discarded and the latter adopted, where it appears that the enforcement of the contract was reasonable and could effect no injury to either party. Furthermore, stipulations which are necessary to make a contract reasonable and conformable to usage are implied with respect to matters concerning which the contract manifests no contrary intention.

It is nowhere denied that defendant agreed with plaintiff for such a sale as was negotiated by plaintiff with Smith, or that there was ever any claim on defendant's part that the sale should be for cash, and such acquiescence on the part of defendant did not make a different contract than the one offered in evidence. By striking out the contract and leaving plaintiff to his action upon a *quantum meruit*, he was left remediless. That there are cases in which the law will imply a promise to pay for services rendered by one person to another in the absence of any bargain to pay therefor cannot be doubted, but no case has been brought to our attention in which it has been held where proof of employment is indispensable to a right to recover for services that in the absence of such proof a recovery can be had. And to entitle a broker to recover commissions for effecting a sale of real estate, it is indispensable that he should show that he was employed

by the owner to make the sale; and this employment must be in writing.

In *McCarthy v. Loupe*, 62 Cal. 299, the court say: "The law in such case would never imply a contract. . . . This particular kind of a contract can only be proved by the introduction of an instrument in writing. Therefore, the plaintiff failed to prove an express contract, and it was upon an express contract alone that he was entitled to recover."

The provision of the code in that state, it is true, specifically provides that the agreement authorizing the employment of an agent or broker to purchase or sell real estate for compensation or commission must be in writing; but we think the same thing is required by the statute of frauds. The written contract in this case being excluded, the plaintiff has no standing in court; but we think he was entitled to rely upon his written contract.

Judgment reversed and the cause remanded for a new trial in accordance with the views which we have expressed.

Rouse, J., concurs.

Hawkins, J., dissents.

[Civil No. 547. Filed March 25, 1897.]

[48 Pac. 213.]

FRANK DYSART, Plaintiff and Appellant, v. COUNTY OF GRAHAM, Defendant and Appellee.

1. OFFICE AND OFFICERS—COUNTY TREASURER—DUTIES—SALARY AS EX OFFICIO TAX-COLLECTOR—LAWS 1889, ACT NO. 47; LAWS 1891, ACT NO. 52; LAWS 1893, ACT NO. 87, SEC. 4; LAWS 1895, ACT NO. 51, CITED AND CONSTRUED.—Act No. 47, Laws 1889, *supra*, and Act No. 52, Laws 1891, *supra*, made treasurers in all counties *ex officio* tax-collectors, and Act No. 87, Laws 1893, section 4, *supra*, fixed the salaries of treasurers, and provided "that no county treasurer shall receive any compensation other than in this section provided." In 1895, the counties were reclassified, Laws 1895, Act No. 51, *supra*, and the annual salary of the treasurers of counties of each class as fixed therein were declared to be in full for services, except where otherwise provided. Upon putting Graham County into another

class, the county treasurer thereof must continue to perform the same services theretofore required of him as *ex officio* tax-collector, and he cannot collect any other salary than that expressly prescribed by statute.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Graham. Owen T. Rouse, Judge. Affirmed.

The facts are stated in the opinion.

E. J. Edwards, and W. M. Lovell, for Appellant.

The services were rendered by appellant for the county as its agent, and not in his official capacity, for the law had clothed him with no such authority, nor imposed any such duty upon him. The taxes had to be collected; the services of appellant were valuable; the county accepted them; the appellant was treasurer, but not *ex officio* tax-collector under the law. "Where the county attorney performs services for the county which are not required of him by law, he may be paid therefor by the county the value thereof." *Commissioners v. Brewer*, 9 Kan. 210.

If extra services be performed by direction of the proper authorities having no connection with the duties of the office, the officer may be allowed compensation therefor. *United States v. Austin*, 2 Cliff. 325, Fed. Cas. No. 14,480; *United States v. Chassell*, 6 Blatchf. 421, Fed. Cas. No. 14,789.

"If the court call on an officer of the court to render services for which no fee is by law established, he is entitled to a reasonable compensation." *The Schooner F. Merwin*, 10 Bened. 403, Fed. Cas. No. 4893.

When a person undertakes to render services for a municipal corporation, not as a public officer, but as its agent, he may recover the reasonable value thereof. *Detroit v. Redfield*, 19 Mich. 376.

Wiley E. Jones, District Attorney, and C. E. Moorman, for Appellee.

HAWKINS, J.—This action was brought by the appellant to recover of appellee the sum of \$566.66, the value of services rendered by appellant for appellee in collecting taxes and per-

forming the duties of tax-collector of Graham County from the twentieth day of April, 1895, to the twenty-eighth day of May, 1896. The appellant was the treasurer of said county, and received his salary as such treasurer, but contends that he performed the duties of tax-collector; and the action is one in *quantum meruit*, alleging the value of such services at fifty dollars per month. A demurrer to the complaint was sustained, and, we think, properly. A public officer, in order for him to recover compensation for performing a public service incident to his office, must put his finger upon the statute that authorizes him to recover his salary or fee; otherwise, it must be performed gratuitously. But appellant contends that under a proper construction of the several statutes of the territory relating to the office of treasurer and tax-collector, and the duties imposed upon the incumbents of these offices respectively, whether filled by one or by different persons, they are separate and distinct offices. This view may be correct under Revised Statutes (456) which provides: "The officers of the county are: 1. Probate judge. 2. District attorney. . . . 4. Treasurer. . . . 6. Tax-collector." The duties of the treasurer are prescribed and defined in chapter 7 of title 13 of the Revised Statutes, and some other statutory provisions. The duties of the tax-collector are prescribed in chapters 6, 8, 9 of title 56 of the Revised Statutes, and by Act No. 84 (p. 127) of the legislative acts of 1893. The duties of the two officers are clearly prescribed in the above statutes, and are separate and distinct, although the duties in each may be performed by the same person. The Revised Statutes of 1887 (par. 1974) provided for treasurers' compensation. Paragraph 460 of the Revised Statutes provided for the consolidation of certain offices by the board of supervisors. This mode of consolidation continued until 1889, when (Act 47, Laws 1889) the legislature amended the Revised Statutes (par. 460), making the sheriff in second- and third-class counties *ex officio* assessors and collectors; and the treasurer of first-class counties *ex officio* tax-collector of such counties. In 1891 (Act No. 52, Laws 1891) the legislature made treasurers in counties of the second and third class *ex officio* tax-collectors, and fixed their compensation "in full for all services rendered by them as treasurers and *ex officio* tax-collectors." It can readily be seen now that all the treasurers in all the three different classes of

counties were *ex officio* tax-collectors, and they were required to perform all the duties of both offices. The compensation was fixed at a percentage. In 1893 (Act No. 87, Laws 1893, sec. 4, p. 142) the legislature fixed the salaries of the treasurers of the several classes of counties, viz.: In first-class counties, \$3,000; second-class, \$1,800; third-class, \$1,500,—payable quarterly; and provided “that no county treasurer shall receive any compensation other than in this section provided.” We now find the counties divided into three classes, and the treasurers in all the classes are *ex officio* tax-collectors; and the duties of both offices are to be performed, and if we adopt the contention of appellant, that they are separate and distinct offices, which is probably true, yet there is no provision for the payment of but one salary. Under the law the duties of both are compelled to be performed, and by the same person. In 1895 the legislature passed Act No. 51 (p. 68), Laws 1895. This is known as the County Classification Act; and the counties are divided into six classes, and fixes the annual salary of the treasurer in each class as follows: First class, \$2,200; second class, \$1,700; third class, \$1,400; fourth class, \$1,200; fifth and sixth classes at \$1,000; and provides that the salaries enumerated shall be in full for services, except where otherwise provided. Before this Classification Act, Graham County was a second-class county, and the treasurer was *ex officio* tax-collector. Upon the reclassification of counties putting Graham in another class of counties, unless the legislature expressly provided otherwise, the county treasurer must continue to perform the same services which were theretofore required of him,—i. e. treasurer and tax-collector. He may have to receive less compensation, but that is a question entirely under the control of the legislature. He cannot escape any of the duties required of him simply because the legislature did not say expressly that he was *ex officio* tax-collector, and required to collect the taxes. Nor can he collect any other salary than that expressly prescribed. It was the intention of the legislature that the salaries fixed in the Classification Act were in full for services as treasurer and for performing the duties of tax-collector. The judgment is affirmed.

Baker, C. J., and Bethune, J., concur.

[Civil No. 508. Filed March 30, 1897.]

[48 Pac. 214.]

WILLIAM HALL et al., Plaintiffs and Appellants, v. M. V.
WARREN et al., Defendants and Appellees.

1. MARRIAGE—COMMON LAW—PERSONAL PROPERTY OF WIFE—TITLE—POSSESSION BY HUSBAND—WAIVER OF RIGHT.—At common law the receipt of a wife's personalty did not of itself make it the property of the husband, unless it was received by him in the exercise of his marital rights, for the purpose of its appropriation to his own use. Such right could be enforced or waived at the husband's pleasure. If waived, the personalty remained the property of the wife.
2. FRAUD—QUESTION OF FACT—EVIDENCE.—Fraud is a question of fact under the code of this territory, and proof necessary to establish the same must be clear and conclusive.
3. FRAUDULENT CONVEYANCES—CREDITOR'S BILL—WIFE'S SEPARATE PROPERTY—EVIDENCE.—When a wife has acquired property with her inheritance, creditors of her husband will not be permitted to subject such property to the payment of his debts where there is a failure to show any equities against the wife, or that she was guilty of any fraudulent representations or concealments or that such creditor ever acted or relied upon any of her expressed or implied representations, though it appears that for a certain time the husband managed the property and she permitted him to hold it out to the world as his own.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge. Affirmed.

Statement of facts:—

This was an action in the nature of a creditors' bill in equity, asking that certain real estate and personal property claimed to be owned by defendant Laura E. Warren be subjected to levy and sale, to satisfy a judgment obtained by appellants in the district court of Maricopa County on the ninth day of March, 1893, against the appellee M. V. Warren. The judgment obtained in Maricopa County was upon a judgment alleged to have been recovered in El Paso County, Colorado, against M. V. Warren, on the ninth day of July, 1892. The complaint alleges, in substance: That, for a long time prior to the obtaining of this Colorado judg-

ment, M. V. Warren was engaged in large livestock business in Colorado and other states and territories in his own name, and represented to all persons with whom he transacted business that the assets of his business belonged to himself, and, from the manner of transacting his business, was enabled to, and did, obtain credit in many thousand dollars. That his wife, L. E. Warren, during all this time did not own, or pretend to own, any property whatsoever. The kind and character of property alleged to be owned by M. V. Warren, with an estimate of his wealth, is set out in the complaint. At the time the indebtedness for which the judgments were obtained was contracted, and upon the faith of such possessions and representations, said Warren was permitted to contract such indebtedness. That a short time before the obtaining of the Colorado judgment, and after contracting the indebtedness, M. V. Warren sold his property, and converted it into money, for the purpose of hindering, delaying, and defrauding his creditors, particularly Hall Bros., and went to Arizona with his wife; and, very soon thereafter, L. E. Warren, wife of said M. V. Warren, purchased the Webb ranch and other property in Maricopa County, paying a large sum therefor in money, which she falsely pretended was her own separate property. That the money paid for said farm and property was not money which belonged to L. E. Warren, and was not her sole and separate funds, nor the proceeds of her sole and separate property, but was the sole and separate property of M. V. Warren, or property acquired after the marriage of the Warrens other than by gift, devise, or descent to either of them. That the farm, etc., purchased in Maricopa County was either their common property or the sole and separate property of M. V. Warren; and he unjustly refused to apply the same to the satisfaction of the Hall judgment. That at the time of the intermarriage of the Warrens, which was about thirty years prior to the commencing of this action, L. E. Warren had no property at all, and since her marriage had acquired no property by gift, devise, or descent, and had at all times lived with her husband. That M. V. Warren, after selling his property as stated, placed the proceeds thereof in the hands of, and under the control of, his wife, with the intent and only purpose of hindering, delaying, and defrauding his creditors, and particularly Hall Bros. That such disposition of his prop-

erty did hinder, delay, and embarrass them in collecting their debt. That they knew of no property in the name of M. V. Warren to make their debt. That whatever possession or control L. E. Warren exercised over the property described in the complaint was as agent or trustee for the benefit of M. V. Warren, and was in fraud of the rights of Hall Bros. The value is alleged, and that the Warrens were making efforts to sell the said property for the purpose of further hindering, delaying, and defrauding their creditors, particularly Hall Bros. That the false claim of L. E. Warren to be owner of said property was a serious obstruction to the levy and sale of the same for the purpose of satisfying Hall Bros.' execution, and if such obstruction was permitted to continue, it would render their judgment ineffectual. Plaintiffs ask to be permitted to examine the Warrens as to their property, etc.; that the obstruction or claim of L. E. Warren to the property be removed, and she be declared a trustee holding such property for the benefit of M. V. Warren; and that she surrender the same, and it be sold to satisfy the judgment against M. V. Warren, etc.; for an injunction and general relief.

The Warrens in answering deny generally and specifically all the material allegations of the complaint, and allege, in substance, that they were married in Missouri in 1859, when M. V. Warren was the owner of no property; that, at the time of the marriage L. E. Warren owned property devised to her by her mother of the value of three thousand dollars; that the property was changed into money, and was her sole and separate property; that afterwards, in 1871, said money was invested in cattle by her in the state of Colorado; that in 1883 the investment made by her with the profits was of the value of about forty thousand dollars; that in said year 1883 she sold her property, and the proceeds, consisting of notes, amounted to forty thousand dollars; that the notes were not paid when due, and the property was returned to L. E. Warren, who afterwards, in 1887, sold the same for forty thousand dollars, receiving notes therefor, and ever since, the same, and the proceeds thereof, have been in her absolute control, and she claimed the same as her sole and separate property; that at the times of such sales the Warrens were free from debt, and M. V. Warren was not indebted to Hall Bros. or to any one; that in 1890 they came to Arizona, and, with the

sole and separate property of L. E. Warren, she purchased the land described in her answer for seventy-five hundred dollars and one thousand dollars worth of cattle and horses, and that the same was her sole and separate property; that there was no community property, and M. V. Warren had no separate property. Much testimony was introduced by the plaintiffs showing how M. V. Warren conducted business in Missouri, Colorado, and other places, which tended to carry out the allegations of the complaint; and by the Warrens showing that L. E. Warren received an estate in Missouri, by inheritance, years ago, both from her mother and grandmother, the proceeds of which were invested as alleged in the answer of the Warrens. The court below found the issues on the merits in favor of the Warrens, and the Halls appeal.

A. Buck, and Franklin & Franklin, for Appellants.

The defendant M. V. Warren, after his marriage with defendant L. E. Warren, in 1859, reduced her moneys and personal property to his own possession, and the same became his property by virtue of his marital rights, and the same was his property while he remained in the state of Missouri; was his property when he came to the state of Colorado, and ever afterward remained his property, so far as the plaintiffs and other innocent parties are concerned. By the law of the state of Missouri prior to the year 1875 all personal property of wife in possession, whether at the time of the marriage or afterwards acquired, vested absolutely in the husband, unless conveyed to her for her sole and separate use. *Woodford v. Stephens*, 51 Mo. 443; *Benne v. Schnecko*, 100 Mo. 250, 13 S. W. 82; *Hart v. Leete*, 104 Mo. 315, 15 S. W. 976; *Leete v. State Bank of St. Louis*, 115 Mo. 184, 21 S. W. 788; *McCoy v. Hyatt*, 8 Mo. 130.

Personal property inherited by the wife, but reduced to the possession of the husband, is subject to his debts; and his creditors have a right to follow the proceeds arising from the sale of such property into land purchased with them, the title to which is taken in the wife's name; and it makes no difference what verbal understanding existed between the husband and wife relative to the ownership of the property. *Davis's Executors v. Justice*, 14 Ky. Law Rep. 741, 21 S. W. 529.

L. E. Warren never at any time appeared in any of the

business transactions of her husband. During the whole course of his large business her name never appears in connection therewith. She never signed a receipt or note, nor did any one else for her as her agent or trustee.

Appellants had no notice that his wife claimed to own the property and money used in his business, nor any part or parcel thereof. The world at large did not know it. Both she and her husband kept it a profound secret.

It is too late now for her to assert any such right, for by her own acts she is, so far as the rights of the appellants are concerned, estopped and postponed.

Where the true owner of property holds out another, or allows him to appear the owner of, or as having full power of disposition over, the property, and innocent third parties are thus led into dealing with such apparent owner, such innocent third parties will be protected. *Bigelow on Estoppel*, 479; *Besson v. Eveland*, 26 N. J. Eq. 468; *Riley v. Vaughn*, 116 Mo. 169, 38 Am. St. Rep. 586, 22 S. W. 707; *McNeil v. National Bank*, 46 N. Y. 325, 7 Am. Rep. 341.

When a married woman gives money to her husband for which she receives no evidence or security, and after nearly thirty years elapse her husband transfers property to her in return for the money so given, the transfer will be considered fraudulent and void as to existing creditors, notwithstanding they may both claim that the money so put in possession of the husband was a loan. *Luers v. Brunjes*, 34 N. J. Eq. 19; *Edelen v. Edelen*, 11 Md. 420; *Kuhn v. Stansfield*, 28 Md. 210, 92 Am. Dec. 681; *Humes v. Scruggs*, 94 U. S. 22.

Fitch & Campbell, for Appellees.

The mere receipt of the wife's personalty does not make it the property of the husband, unless he receives it in the exercise of his marital rights for the purpose of its appropriation to his own use.

"The personal property of the wife which came to her after the marriage did not become the property of the husband *ipso facto*, but only when it had been actually reduced to possession by him by such acts as evinced an intention to divest his wife's right or title and make it absolutely his own." *Handford v. Devol*, 21 Ind. 405, 83 Am. Dec. 351; *Timbers v. Katz*, 6 Watts & S. 290.

"This right of the husband is regarded as a marital right, to be enforced by him or waived at his pleasure. If waived, the property, whether it consists in personal chattels, money, or choses in action, remains the property of the wife." *Hall v. Young*, 37 N. H. 134.

"If under certain circumstances the gift from a husband to a wife will be upheld, it is not perceived why the same result will not follow when the gift emanates from a third person, when the husband assents to it, and treats the property as belonging exclusively to his wife." *Welsh v. Welsh*, 63 Mo. 57; *Hoes v. Boyer*, 108 Ind. 494, 9 N. E. 430.

Admitting the law of estoppel to be as contended for by appellants, the facts do not establish any estoppel.

Was the transfer of the two notes of seven thousand five hundred dollars each to Mrs. Warren a fraudulent transfer, in the light of the evidence in this case? "Fraud" in this case is a question of fact.

The statutes of Colorado and Arizona on the subject of fraudulent conveyances are identical. Gen. Stats. Colo., sec. 1529; Rev. Stats. Ariz., sec. 2037.

Under the statute the question of fraud does not depend upon "reported decisions." Fraud upon the part of the Warrens must be proved by plaintiffs as any other fact in the case. *Manchester v. Tibbets*, 121 N. Y. 219, 18 Am. St. Rep. 816, 24 N. E. 305; *Fulp v. Beaver*, 136 Ind. 319, 36 N. E. 251; *Threlkel v. Scott*, 89 Cal. 351, 26 Pac. 879; *Hutchinson v. National Bank*, 133 Ind. 271, 36 Am. St. Rep. 537, 30 N. E. 952.

It is not fraudulent for a husband to prefer his wife as a creditor. *Jewell v. Knight*, 123 U. S. 426, 8 Sup. Ct. Rep. 193; *Garner v. National Bank*, 151 U. S. 420, 14 Sup. Ct. Rep. 370; *Brock v. Hudson Bank*, 48 N. J. Eq. 615, 27 Am. St. Rep. 451, 23 Atl. 269.

If the husband owes the wife, he can pay his debt to her, even though his other creditors will receive nothing. Relationship is not indicative of fraud, and no clearer proof of *bona fides* is required than in other cases. *Teague v. Lindsley*, 106 Ala. 266, 17 South. 538.

HAWKINS, J. (after stating the facts).—Appellants contend that it was proved that M. V. Warren, after his marriage, in the exercise of his marital rights under the common law,

which was in force in Missouri up to 1875, reduced her moneys and personal property to his possession; and the same thereby became his property, was his property when they went to Colorado, and ever afterwards remained his property. The testimony is somewhat conflicting upon this. It is clearly shown that, at the time of their marriage, M. V. Warren had only about two hundred dollars' worth of property, and that Mrs. Warren had property inherited from her mother of the value of about three thousand dollars, and inherited property from her grandmother of about the same value; and while witnesses living in Missouri testify that M. V. Warren always did business in his own name in that state, and the property was owned by him, yet a deed introduced shows that real estate in that state was owned by L. E. Warren. The will of her grandmother also showed how she obtained her inheritance, and it is practically conceded that it was from the proceeds of money derived from her inheritance that she finally acquired the property now in Maricopa County. The contract with Hall Bros. was made in 1884, in Kansas. It appears to have been made between them, Warren, and R. J. Howard. The judgment against M. V. Warren grows out of that contract, whereby the Halls sold their interest in the Wilcox herd, or Trinidad Cattle Company's herd, for certain sums, notes, etc., to be assumed by Warren & Howard, and paid Wilcox. It appears that Warren paid one half of the amount to the Halls and Wilcox, losing many thousand dollars on the transaction. He evidently thought it a several transaction, and that he had paid all that he had assumed, and sued the Halls in the Colorado court for damages growing out of this contract; and they counterclaimed, and the court held that the contract was joint, and gave judgment against Warren for \$15,464.78. This judgment is valid against M. V. Warren, but it has no binding force whatever against L. E. Warren. The testimony shows that the proceeds of her inheritance were invested in cattle, and in 1883, before the agreement of M. V. Warren and Howard with the Halls, the cattle were sold and notes taken. The cattle were returned, and notes were taken again for forty thousand dollars in 1887, when two seventy-five-hundred-dollar notes were turned over to Mrs. Warren, and twenty thousand dollars paid Scruggs, five thousand dollars expended for other debts and living expenses, and the fifteen

thousand dollars is all Mrs. Warren brought to Arizona as the proceeds of her inheritance. If the allegation were true that, in the exercise of marital rights, the personalty of L. E. Warren had been converted to the ownership of M. V. Warren, it nowhere appears from the testimony that, in getting these seventy-five-hundred-dollar notes, it was in fraud of Hall Bros.' rights. The testimony of the Warrens shows that these cattle, etc., purchased with Mrs. Warren's money, were always her property. It also shows that she knew nothing of the trade made with Hall Bros. at Dodge City, Kansas, until after it was made; that, when she did find out about it, she objected to it; and that none of her money went into it.

At common law, the receipt of a wife's personalty did not of itself make it the property of the husband, unless it was received by him, in the exercise of his marital rights, for the purpose of its appropriation to his own use. Such right could be enforced or waived at the husband's pleasure. If waived, the personalty remained the property of the wife. 1 Bishop on Married Women, par. 119; *Hall v. Young*, 37 N. H. 134 et seq. We think the court below, from the evidence in the case, was clearly authorized in holding that Warren never did take possession of his wife's personal property by virtue of his marital rights. The evidence shows that they always considered it the property of Mrs. Warren. It was treated as such in 1883 and in 1887, when Mrs. Warren received the notes; and this court cannot disturb the finding of the court that there was no fraud in her receiving the notes, especially as we are unable to find any evidence showing fraud either on the part of Warren or his wife. If she had been a creditor (which question is not in this case), he would have had the right to prefer her to other creditors, no fraud appearing. If her personal property had been converted by virtue of the marital rights of some common-law jurisdiction, there appears no reason why, no intervening rights of creditors appearing, and no fraud of any kind being proved, he could not have restored her property at any time. Fraud is a question of fact, under the code of this territory, and also under the statutes of Colorado, and proof necessary to establish the same must be clear and conclusive. We find no such degree of evidence in the record, and, with the witnesses before the court below, it was its province to pass upon all questions of

conflict in the evidence, and we think its decision and judgment should on this question be sustained.

It is also claimed that if L. E. Warren had any claim to the personalty and other property, she permitted her husband to appear and hold out that he was the owner, with full power of disposition of the same; and that as Hall Bros. had no knowledge that she claimed or owned said property, and gave large credit to M. V. Warren in pursuance thereof, the property handled by M. V. Warren is subject to sale, to satisfy Warren's judgment to appellants, whether now in his possession or that of his wife, L. E. Warren. This might be true under certain circumstances, but the facts in this case do not apply. Hall seems to have known that the Warren cattle had been sold when he made the agreement with Warren & Howard, at Dodge City. The Warrens had sold their cattle in 1883. Warren & Howard had in 1884 assumed payment of certain notes of Hall Bros. to Wilcox. These notes were secured by a lien on the Hall Bros.' interest in the Wilcox or Trinidad Cattle Company's herd, and Hall appears to have thought the cattle were good for the amount. It is true they secured a note of Warren for twenty-six hundred dollars, and to that extent gave him credit; but this was paid by Warren, and he also paid cash, amounting, with the note, to one half of the interest purchased by him and Howard. He was held liable on this contract, which was held to be joint, for Howard's part also. This is not a sufficient cause for a court of equity to subject the property of Mrs. Warren to the satisfaction of such an obligation. Mrs. Warren does not appear to have led Hall Bros. to believe that Warren was the owner of the cattle sold prior to the Hall trade. The doctrine of estoppel is well stated in a similar case in *De Berry v. Wheeler*, 128 Mo. 84, 49 Am. St. Rep. 538, 30 S. W. 339 et seq.: "The question, then, is whether the wife, by permitting the husband to hold the title to her land, by recorded deed, in his own name, would, without other act or representation on her part, be estopped to deny the title as against plaintiff, who, without her knowledge, gave credit to the husband upon the faith of his ownership as it appeared of record. Equitable estoppel arises 'when one, by his words or conduct, willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his

own previous position.' In such case 'the former is concluded from averring against the latter a different state of things as existing at the time.' To make this estoppel complete, it is said three things must combine, 'namely, fraudulent representation or withholding the truth when duty requires one to speak, reliance on the expressed or implied representation by the party defrauded, and the consequent act taken by the defrauded person.' Bishop on Married Women, 487. Again, it is said by another: 'It must appear that there was fraud or gross neglect; that the party making the admission, by his declaration or conduct, was apprised of the true state of his own title; and that others were acting in ignorance of it; and that he intended to deceive or was culpably negligent in the non-assertion of his rights; that the other party had no knowledge, or means of acquiring knowledge, of the true state of the title; and that he relied upon such admission, to his injury.' Hermann on Estoppel, 987. It must be conceded that Mrs. Wheeler, by permitting the record title to the land to remain in her husband, represented to the public that her husband was the owner of it. Yet in this alone no one could be defrauded. The fraud and the consequent estoppel would only exist when she knew, or from all the circumstances ought to have known, that others, relying upon what she permitted the record to tell them, were dealing or might deal with the husband in such a manner as to cause them to alter their previous condition to their injury." The contract with Warren & Howard does not appear to have caused the Halls to alter their previous condition by any act on the part of Mrs. Warren. They were primarily liable on the Wilcox notes. They were secured by cattle which was thought by all of them to be ample to pay them. This liability by the contract was shifted from the Halls to Howard & Warren, as far as it was able to do. Warren paid one half of it. Howard failed to pay his part. The court gave judgment practically for the default of Howard against Warren.

This was strictly an action at law, and we have gone into the case, not from any fault with the Colorado judgment, but simply to find out if any equities have arisen therein in favor of Hall Bros. against L. E. Warren. The court below was fully warranted in finding none. She was guilty of no fraudulent representations. She did not withhold the truth when

duty required her to speak. Hall Bros. never relied on or acted upon any of her expressed or implied representations. Then, upon what theory could the hand of equity be called upon to take her property, received from the proceeds of her inheritance, and apply it to the payment of this judgment? There is none shown under the state of facts in this case. The findings of the court below upon the merits are just, and its judgment is affirmed.

Bethune, J., and Rouse, J., concur.

[Civil No. 538. Filed March 30, 1897.]

[48 Pac. 217.]

P. J. COLE, Defendant and Appellant, v. TERRITORY OF ARIZONA, ex rel. J. F. WILSON, Attorney-General, Plaintiff and Appellee.

1. OFFICE AND OFFICERS—TERRITORIAL TREASURER—GOVERNOR—POWER OF REMOVAL.—REV. STATS. ARIZ. 1887, PARS. 2978, 3049; LAWS ARIZ. 1891, ACT NO. 65, APPROVED MARCH 19, 1891, CITED AND CONSTRUED—ORGANIC ACT.—Paragraph 2978, *supra*, providing for the office of territorial treasurer, fails to fix the tenure. Paragraph 3049, *supra*, provides that every officer whose term is not fixed by law holds at the pleasure of the appointing power. Laws 1891, Act No. 65, provides that the governor has power to remove from office any territorial officer appointed by him or his predecessor, or who has been so appointed by and with the advice of the legislative counsel, when, in his judgment, the best interest of the public service shall be subserved thereby; and an official letter to the effect that it is the desire of the governor that the office be vacated constitutes sufficient notice to the incumbent. Under these statutes, the governor has the power to remove the territorial treasurer from office. These acts are not contrary to the Organic Act, which nowhere prohibits such laws, but is a rightful subject of legislation and therefore permitted.
2. SAME—COMMON LAW—PROPERTY IN OFFICE—JUDGMENT OF OUSTER—NO APPLICATION IN THIS TERRITORY.—The common law, which regards the office as a hereditament, and that an incumbent has a property in his office, and that he cannot be deprived thereof without a judgment of a court, has no force in this territory.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge. Affirmed.

Statement of facts:—

The suit was filed on date of June 18, 1896. The defendant interposed a demurrer to the complaint. First, generally; and, second, demurring to the complaint on the ground that the complaint does not show that at the time of the appointment of Thomas E. Farish to the office described in the complaint there was a vacancy in said office; third, that no facts are stated showing the authority of the governor of the territory to appoint said Farish during the recess of the legislative council. The defendant, further answering the complaint, sets up that he is a resident of the territory, and over the age of twenty-one years, a duly qualified elector of the territory. Second, That on the thirtieth day of January, 1895, defendant was duly nominated by the governor of the territory of Arizona to the office of territorial treasurer of the territory of Arizona. That on date February 6, 1895, he was confirmed by the legislative council of the territory of Arizona as such territorial treasurer. That on the seventh day of January, 1895, defendant was duly commissioned by the governor as such treasurer. That on the eleventh day of February, defendant duly qualified as such territorial treasurer by taking the oath of office in due form of law and filing his official bond. That said Thomas E. Farish claims said office by reason of an alleged and pretended appointment thereto by the governor of the territory of Arizona on the eighteenth day of June, 1896. That said appointment was made without warrant or authority of law, and that on said day said defendant was holding said office, and discharging the duties thereof by virtue of his aforesaid appointment, confirmation, and qualification, and that at the said last-mentioned date, or prior thereto, defendant had not resigned said office, nor had he been removed therefrom for cause, or had charges or accusations been filed against him, or investigation or trial had therein. That on the trial of the cause the following stipulation was entered into between the parties: (1) That defendant, Cole, is a citizen of the United States, over the age of twenty-one years, and a duly-qualified elector of the territory of Arizona. (2)

That he was, on the sixth day of February, 1895, duly commissioned as treasurer of the territory of Arizona, and that on the eleventh day of February, 1895, he was duly qualified as such officer, and entered upon the discharge of his duties as such territorial treasurer. (3) That no charges have been filed against defendant, Cole, or accusations against him upon his removal, nor no notice was given nor hearing had. That on the fifteenth day of January, 1896, the governor of the territory of Arizona requested said P. J. Cole to resign his position as territorial treasurer, which said Cole refused to do. That on the eighteenth day of June, the governor of the territory thinking it, in his opinion, for the best good of the public service that his office be vacated, the said defendant was thereby removed from said office, and said office declared to be vacant, in the following language, to wit: "Territory of Arizona, Executive Office. Phoenix, Arizona, June 18, 1896. P. J. Cole, Esq., Treasurer of the Territory of Arizona—Dear Sir: The judgment of the governor being that the best interests of the public service will be subserved by you vacating the office above named, which you now hold, and his desire being that the said office be so vacated, you are therefore hereby removed from said office. Hereof take notice. Respectfully, B. J. FRANKLIN, Governor of Arizona." (4) That on the eighteenth day of June, 1896, Thomas E. Farish, a citizen of the United States, a resident of the territory of Arizona, over the age of twenty-one years, and a qualified elector of said territory, was appointed to said office of territorial treasurer by the governor of said territory, and duly commissioned by said governor as such territorial treasurer by taking the oath of office before a proper officer duly authorized to administer oaths, and in the form prescribed by law, which said oath was duly indorsed upon said commission, and also by filing in the office of the secretary of the territory his oath of office as required by law, and by executing and delivering his official bond as such territorial treasurer in the form and with securities in the amount required by law—to wit, the sum of forty thousand dollars—and that bond was duly approved by the governor of the territory of Arizona, and approved and filed with the secretary of the territory of Arizona. That thereupon, on the eighteenth day of June, 1896, said Farish attempted to enter upon the discharge of said

office of territorial treasurer, but that said Cole did give out, assert, and claim that he was entitled thereto, and to the emoluments thereof, and ever since said day has continued to do so, to the exclusion of said Farish, declaring himself the lawful treasurer, and still refuses to surrender the same to the said Farish.

L. H. Chalmers, and Joseph Campbell, for Appellant.

As to whether the governor has the power to remove from office appellant relies upon the case of *Field v. People*, 2 Scam. 79; *Dullam v. Wilson*, 53 Mich. 392, 51 Am. Dec. 128; *In re Attorney-General*, 2 N. M. 49; *Territory, ex rel. Fisk v. Rodgers*, 1 Mont. 252.

Upon the question that the appointment of Farish was illegal and void, defendant relies upon the authorities above cited and upon *Honey v. Graham*, 39 Tex. 12; *People v. Bissell*, 49 Cal. 411; *Tappan v. Gray*, 9 Paige, 507; *People v. Carrique*, 2 Hill, 93.

J. F. Wilson, Attorney-General, for Appellee.

The governor has power to remove any officer appointed by him, where such power is not denied by express statute; this is based upon two propositions: 1. The power of removal is incident to the power to appoint, unless it is prohibited by law; 2. The office of territorial treasurer, not being of fixed tenure, is subject to the power of removal given the executive under the statute.

That the power to remove is incident to the power of appointment, unless expressly prohibited, see *Ex parte Hennen*, 13 Pet. 230; Story on the Constitution, secs. 1538-1544; Black on the Constitution, pp. 105, 106; *Welch v. Cook*, 7 How. Pr. 282; *Smith v. Fisher*, 24 Wend. 216; *People v. Snedeker*, 14 N. Y. 52; *Sprague v. Brown*, 40 Wis. 612; *State v. Benedict*, 15 Minn. 158; *State v. Hawkins*, 44 Ohio St. 98, 5 N. E. 228; *Galbraith v. McCollum*, 98 Mich. 219, 57 N. W. 115; *Trimble v. Phelps*, 19 Colo. 187, 41 Am. St. Rep. 236, 34 Pac. 981; *Territory v. Cox*, 6 Dakota, 501; *Cameron v. Parker*, 2 Okla. 277, 38 Pac. 36; *McAllister v. United States*, 141 U. S. 174, 11 Sup. Ct. Rep. 949; *Wingard v. United States*, 141 U. S. 201, 11 Sup. Ct. Rep. 959.

HAWKINS, J. (after stating the facts).—The only question in this case is, Had the governor the power of removal? We think he had. Paragraph 2978 of the Revised Statutes of 1887, providing for the office of territorial treasurer, and for the commissioning of the incumbent, fails to fix the tenure. And paragraph 3049 of the Revised Statutes provides that every officer whose term is not fixed by law holds at the pleasure of the appointing power. This was the statutory regulation pertaining to this office when Cole took the appointment, and is decisive of the question. Nothing in the Organic Act for this territory prohibits such law. The power to remove is incident to the power of appointment, unless expressly prohibited by law. *In re Hennen*, 13 Pet. 230. This doctrine has become so well settled that it is now the text-law of this country. Story on the Constitution, secs. 1538-1544; Black on Constitutional Law, pp. 105, 106. It is followed by most of the states. *Welch v. Cook*, 7 How. Pr. 282; *Trimble v. People*, 19 Colo. 187, 41 Am. St. Rep. 236, 34 Pac. 981; *People v. Fisher*, 24 Wend. 216; *People v. Snedeker*, 14 N. Y. 52; *Territory v. Cox*, 6 Dak. 501; *Sprague v. Brown*, 40 Wis. 612; *Cameron v. Parker*, 2 Okl. 277, 38 Pac. 14 et seq.; *State v. Benedict*, 15 Minn. 158 (Gil. 198); *State v. Hawkins*, 44 Ohio St. 98, 5 N. E. 228; *Galbraith v. McCollum*, 98 Mich. 219, 57 N. W. 115. It is also the rule in cases of appointments under laws of the United States by the President. *McAllister v. United States*, 141 U. S. 174, 11 Sup. Ct. Rep. 949; *Wingard v. United States*, 141 U. S. 201, 11 Sup. Ct. Rep. 959. No one has a right of property in an office such as will bar the executive from removing him. *State v. Hawkins*, 44 Ohio St. 98, 5 N. E. 234; *Cameron v. Parker*, 2 Okl. 277, 38 Pac. 14, and authorities there cited. Most of the cases relied upon by the appellant were decided either where the constitution or laws of the state made no provision for the governor to remove, or where the incumbent had a property in his office, and that he could not be deprived of his office without a judgment of a court. This latter view is supported by the common law, which regarded an office as an hereditament, but no such doctrine has ever had any force in this territory. This territory also has an act (Laws 1891, p. 96) which provides that the governor has power to remove from office any territorial officer appointed by him or his predecessor, or who has been so ap-

pointed by and with the advice of the legislative council, when, in his judgment, the best interests of the public service shall be subserved thereby; and an official letter to the effect that it is the desire of the governor that the office be vacated constitutes sufficient notice to the incumbent. This law is absolutely conclusive of the question. It is not contrary to the Organic Act. That act nowhere prohibits such a law. It is silent on the subject, and what is not prohibited therein on all rightful subjects of legislation is permitted. The judgment is affirmed.

Bethune, J., and Rouse, J., concur.

[Civil No. 505. Filed April 1, 1897.]

[48 Pac. 291.]

THE CONSOLIDATED NATIONAL BANK OF ARIZONA et al., Plaintiffs and Appellants, v. PIMA COUNTY et al., Defendants and Appellees.

1. NATIONAL BANKS—TAXES AND TAXATION—SHARES—REV. STATS. U. S., SEC. 5219, CITED AND CONSTRUED—TERRITORIAL ACT (LAWS ARIZ. 1893, ACT NO. 85, APPROVED APRIL 13, 1893), IN CONFORMITY THEREWITH, VALID.—The power to tax national bank associations as fixed by section 5219, *supra*, is confined and limited to the shares of such associations, and such shares may be included in the valuation of the personal property of the owners and holders of such shares. The same taxes may be imposed on such shares as are imposed by the authority of the state on other personal property. The limitations on the power to tax such shares are: 1. "That the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state," and 2. "That the shares of any national banking association, owned by non-residents of any state, shall be taxed in the city or town where the bank is located, and not elsewhere." The statute of Arizona, *supra*, providing for the taxation of shares of national bank stock complies strictly with said act of Congress.
2. SAME—SAME—SAME—FAILURE TO TAX SHARES OF BUILDING AND LOAN ASSOCIATIONS—INDIVIDUAL MONEY-LENDERS—DOES NOT AFFECT VALIDITY OF TAX.—The failure of the Revenue Act of Arizona to provide for taxing the shares of building and loan associations and of money of private citizens loaning money does not make the tax in question illegal.

3. ~~SAME—SAME—SAME—ASSESSMENT AS PERSONALTY—VALID—LAWS~~
ARIZ. 1893, ACT NO. 85, APPROVED APRIL 13, 1893, CITED AND CON-
STRUED.—The assessment of shares of national bank stock as per-
sonal property, substantially in conformity with the law for the
assessment of other personal property, is valid, though the act of
April 13, 1893, specially prescribed a mode for the assessment of
such shares, the purpose of such latter act being to provide a mode
of ascertaining the ownership of such property, to the end that it
might be assessed.

BAKER, C. J., dissenting.

APPEAL from a judgment of the District Court of the
First Judicial District in and for the County of Pima.
Joseph D. Bethune, Judge. Affirmed.

The facts are stated in the opinion.

Charles Weston Wright, for Appellants.

William M. Lovell, District Attorney, for Appellees.

ROUSE, J.—The Consolidated National Bank of Arizona is
a corporation duly organized under the laws of Congress as a
national bank, having its place of business at Tucson, Pima
County, Arizona, with a capital of fifty thousand dollars,
divided into five hundred shares, each of the par value of one
hundred dollars. It is admitted that in 1893 the assessor of
Pima County attempted to assess the shares of said bank, and
listed and assessed one hundred of said shares to H. B. Tenney,
as follow, to wit: "H. B. Tenney, cashier Consolidated Na-
tional Bank, Tucson, personal property, value \$10,000"; and
that he listed and assessed the other four hundred shares as
follows, to wit: "Unknown owners, personal property, value
\$40,000.00." Said lists were returned and passed upon and
equalized by the board of supervisors of said county, as a
board of equalization. No one appeared before said board
on behalf of said Tenney or said bank to have said lists cor-
rected or altered, and they were duly entered on the tax-roll
for said year. There was listed and assessed for said year as
the property of said Tenney other personal property in addi-
tion to said one hundred shares of bank stock, on which he
afterwards, in due time, paid the taxes. Said bank also paid
the taxes on all property assessed to it. Appellants, as plain-
tiffs, filed a joint complaint against appellees, as defendants,

for an injunction to restrain the collection of the taxes levied on said shares in said bank, and a temporary restraining order was made. Thereafter the case was tried, and the injunction was made perpetual as to the four hundred shares, and dissolved as to the one hundred shares assessed to Tenney. From that decision, plaintiffs appeal. No question as to a misjoinder of parties as plaintiffs was raised in the district court, and the right of said bank to join in the appeal to this court has not been disputed; hence those questions will not now be determined as independent questions. The judgment of the district court dissolving the injunction as to the one hundred shares of stock in said bank assessed to Tenney is the only question presented for our decision. We will not consider the points urged for and against the reversal of the judgment in the order in which they have been presented by the distinguished counsel for the respective parties.

By decisions of the supreme court of the United States too numerous to cite it has been determined that, without congressional authority, national banks cannot be taxed by the states. By section 5219 of the Revised Statutes of the United States the authority to tax national banks is given as follows: "Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located; but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations, located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by non-residents of any state, shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county, or municipal taxes to the same extent, according to value, as other real property be taxed." The legislature must by law, determine and direct the manner and place of taxing the shares of national banking associations located within the state. There are only two restrictions placed by Congress on the power of the legislature of a

state in respect to the taxation of the shares of national banking associations. Congress has not seen fit to specify the form of the law to be enacted by the state, or to direct the form of the assessment, or to fix the penalties on those who may fail to pay the taxes on such property. These things have been left to the state in which said associations are located, with no other restrictions than those above mentioned. The state may impose the same penalties on those who hold shares in such banking associations for the collection of taxes thereon as it imposes for the non-payment of taxes on other property. *Palmer v. McMahon*, 133 U. S. 660, 10 Sup. Ct. Rep. 324; *Mercantile Bank v. New York*, 121 U. S. 138, 7 Sup. Ct. Rep. 826. It will be observed that the power to tax national bank associations is confined and limited to the shares of such associations, and that such shares may be included in the valuation of the personal property of the owners or holders of such shares. It will further be observed that the same taxes may be imposed on such shares as is imposed by authority of the state on other personal property. Rev. Stats. U. S., sec. 5219. The limitations imposed on the power to tax the shares of national bank associations are: 1. "That the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state"; and 2. "That the shares of any national banking association, owned by non-residents of any state, shall be taxed in the city or town where the bank is located, and not elsewhere." The main purpose of Congress in fixing limits to state taxation on investments in shares of national banks, as above mentioned, was to render it impossible for the state, in levying such tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business, and operations of like character; that is, to prevent unjust discrimination against those who have money invested in the shares of national banks. *Mercantile Bank v. New York*, 121 U. S. 138, 7 Sup. Ct. Rep. 826; *People v. Commissioners of Taxes*, 4 Wall. 244; *Palmer v. McMahon*, 133 U. S. 660, 10 Sup. Ct. Rep. 324.

The law of the territory of Arizona with reference to the taxes involved in this case was approved April 13, 1893, (Laws 1893, Act No. 85,) and the first section thereof is as follows, viz.: "That hereafter all the shares of stock of every bank or

banking association, whether organized under authority of any law of this territory or any other state or territory or any act of Congress of the United States, and all of the capital stock of every person, association or other corporation whatever, engaged in the business of banking, buying and selling exchange, and receiving deposits, shall be assessed and taxed in the county where such bank or banking association or corporation is located for the transaction of business; provided, however, that the shares of stock of all banks, including national banks, shall not be taxed at a greater rate than is assessed upon any other moneyed capital in the hands of individual citizens of the territory, and that the shares of stock of any banking association, owned by non-residents of the territory, shall be taxed in the county where the bank is located, and not elsewhere." It will be observed that said section of the territorial law complies strictly with the said act of Congress, and subjects the owners and holders of shares in national bank associations to the payment of taxes only, as the owners and holders of shares in other banks and moneyed institutions and the capital of individuals are taxed. The supreme court of the United States, in construing section 5219 of the Revised Statutes of the United States, has said: "The restriction therein imposed is equality of assessment with other moneyed capital; not with other property generally, but with that property which passes under the description of moneyed capital." *Talbott v. Silver Bow Co.*, 139 U. S. 438, 11 Sup. Ct. Rep. 594. The term "moneyed capital," as used in said section, is defined to embrace "capital employed in national banks, and capital employed by individuals, when the object of their business is the making of profit by the use of their moneyed capital as money; as in banking, as that business is defined." *Palmer v. McMahon*, 133 U. S. 660, 10 Sup. Ct. Rep. 324.

On the trial evidence was admitted establishing the fact that a certain building and loan association, duly organized and incorporated, was doing business in Tucson, Arizona, having a large capital, divided and represented by a large number of shares; and the nature of the business conducted by said corporation was to loan to its shareholders the money of said corporation. It was shown in evidence that said corporation was not assessed, excepting upon a small portion of real estate owned by it, and on some inconsiderable portion of per-

sonal property in the shape of office furniture. It is further contended in argument that there are large sums of money belonging to private individuals,—that is, loaned out,—and that the owners thereof are not taxed. The failure of the law to provide for taxing the shares of said building and loan association and similar associations, and of the money of private individuals referred to, is urged against the tax on the shares of stock in the national bank involved in this case, and against the validity of said territorial law. With reference to those matters, the supreme court of the United States, in construing section 5219 of the Revised Statutes of the United States, has said: "Obviously, by this section, as interpreted by the decisions of this court, the limitation applies solely to a parallel with the individual or corporation whose capital in money is used with a view of compensation for the use of money." *Talbott v. Silver Bow Co.*, 139 U. S. 438, 11 Sup. Ct. Rep. 594; *Palmer v. McMahon*, *supra*. Said building and loan association cannot be compared with a banking association. The exemption or rather the failure to tax the shares of the said building and loan association does not make the tax in question illegal. *Mercantile Bank v. New York*, 121 U. S. 138, 7 Sup. Ct. Rep. 826.

On the trial proof was made that the assessor of Pima County, by letter, demanded of Tenney a list of his shares in the banking association; that receiving no reply from Tenney, said assessor assessed Tenney's personal property, and with it personal property valued at ten thousand dollars. It was conceded that said ten thousand dollars was one hundred shares of said Consolidated National Bank of Arizona, each share of the par value of one hundred dollars. Said list of the property of Tenney was returned by the assessor, and was passed upon by the board of supervisors of said county, as a board of equalization. Tenney did not appear before said board in person or otherwise to urge objections to or corrections of said assessment. That Tenney was the owner of said one hundred shares of said banking association, and that they were of the value, in the aggregate, of ten thousand dollars at the time of the assessment was not disputed on the trial, and is not controverted now. The course pursued by the said assessor in assessing said shares was substantially the same as prescribed by law for the assessment of other per-

sonal property. Appellants contend that the assessment should have been made differently; that the act of the legislative assembly of Arizona of April 13, 1893, prescribed a mode by which said assessment should have been made, and, as that mode was not pursued, the assessment was illegal and the tax void. The act of Congress (Rev. Stats. U. S., sec. 5219) in effect makes the shares of national banks personal property, by declaring that "nothing therein shall prevent such shares from being included in the valuation of the personal property of the holders of such shares." By paragraph 2631 of the Revised Statutes of Arizona real and personal property are defined. The definition of real estate, as therein given, is that by which said term is generally defined. Personal property is therein defined to include all other property not embraced in the said definition of real estate. It is further provided therein that, for the purpose of taxation, the person in possession of personal property is deemed to be the owner thereof. By paragraph 2640 it is made the duty of the assessor, between certain dates mentioned, to ascertain all the property in his county subject to taxation, and the owners thereof, and the cash value thereof; to assess the property to the owners or holders thereof. It is also, by said paragraph, made the duty of the officers, etc., of corporations, to furnish a descriptive list of the property under their control to the assessor, on demand. By paragraph 2641 it is made the duty of all persons, including officers of corporations, whether they be requested by the assessor to do so or not, to make out under oath, and deliver to the assessor, a list of the property they own or which is under their control. Said paragraph is as follows: "It shall be the duty of every person owning, or having charge or under his control, property in the territory subject to taxation, and as in this act provided, to make out and deliver to the assessor, between the first Monday in March and the first Monday in June of each year, a correct list of the same as required by law, whether he shall receive from the assessor a demand or notice to do so or not; and every assessment made against property subject to taxation shall be valid whether such notice was received or not." The evidence in this case demonstrates the fact that, as to the said one hundred shares of the stock of said banking association, the assessor pursued the course prescribed for the assesment of ordinary

personal property; that the assessment was duly returned and equalized by the board of equalization; that Tenney did not appear before said board to have the assessment corrected; that on the trial he did not dispute the fact that he owned that number of shares, or that they were not of the value, in the aggregate, of the amount for which they were assessed. If they were the same as ordinary property, the tax was valid, and could not be questioned, except in a proceeding instituted for that purpose on some one of the well-defined grounds for equitable relief.

But it is contended by appellants that by the act of April 13, 1893, a special mode is provided for the assessment of the stock of banking associations. Section 3 of said act is cited in support of said contention. It is as follows: "Upon the demand of the assessor, the president, cashier, or other officer in charge of an incorporated bank association, person or persons, shall make out and deliver to such assessor . . . a statement showing the name and residence of each stockholder therein, . . . and the amount of stock held by him. . . . If any such person, officer, or agent shall refuse to make out and deliver such statement, . . . he shall be personally liable to the county for the whole amount of taxes which should be paid upon such stock; and it shall be the duty of said assessor or tax-collector, as the case may be, to collect the same as other county and territorial taxes are collected." The above section, excepting as to the penalty to be imposed upon the officers and persons therein designated, is practically a rescript of paragraph 2641 of the Revised Statutes of Arizona. The evident purpose in view was to provide a mode of ascertaining the ownership of such property, to the end that it might be assessed. In section 2 of said act of April 13, 1893, there is the following: "Bank stock shall be entered in the name of the holders of the several shares thereof respectively." By said section the obligation is imposed upon the assessor to do what is therein required. If said section 3 was intended to be the only mode to be pursued in making the assessment of the stock in banking associations, on refusal of the officers and persons therein mentioned to furnish a list, etc., thereof, no tax could be collected, for there would be no way to fix the amount of taxes due; hence the officers therein mentioned could not collect any penalty, for there would be no penalty fixed, and no way of

fixing such taxes to be collected. We conclude that, under said act of April 13, 1893, shares of stock in national banks, as well as other banks and banking corporations, are subject to taxation, and the assessment of such shares in such banking associations can be made without reference to the provisions of said section 3, and that an assessment made thereon as if said shares of stock were ordinary personal property would be valid. Hence we hold that the assessment in this case is valid.

On the trial an agreed statement of facts was made, to the effect that the tax-collector of Pima County was about to seize and sell the said one hundred shares of the stock of said banking association, and that he would do so if not restrained. We have already discovered from the evidence that said shares were not specifically described; that is, that they were not described so that they could be known from other shares of said association. If we should construe this agreement literally, we would be compelled to hold that said injunction would have to be sustained; but we think said agreed statement of facts, taken in connection with all other facts in the case, must be construed to mean that the collector would proceed to collect, in the way pointed out by law, the amount of taxes due on said shares, as fixed by said assessment, as so much due from the owner thereof, in the way said amount would be collected if it was due on other ordinary personal property, and not that said officer was about to seize the specific shares. The provisions of said act of April 13, 1893, make the shares of all banking associations taxable in the same way. It is a valid act. There being no evidence that the shares of stock of any similar association were exempt from taxation (*Bank v. Ayers*, 160 U. S. 660, 16 Sup. Ct. Rep. 412), the judgment of the district court must be affirmed, notwithstanding the contention of counsel for appellants that part of the capital of said banking association was invested in United States and other bonds not taxable (*Van Allen v. Assessor*, 3 Wall. 573; *Bradley v. People*, 4 Wall. 459; *People v. New York County Commissioners of Taxes*, 4 Wall. 244; *Palmer v. McMahon*, 133 U. S. 660, 10 Sup. Ct. Rep. 324), and notwithstanding the fact that the taxation of corporations other than banks is made under a different system (*Mercantile Bank v. New York*, 121 U. S. 138, 7 Sup. Ct. Rep. 826); and it is so ordered.

HAWKINS, J.—I concur in the affirmance of the foregoing action. I think, however, that the assessor should have stated in his assessment that the personal property assessed was "100 shares of the capital stock in the Consolidated National Bank of Tucson, Arizona, value one hundred dollars per share, total value ten thousand dollars," if this was the correct valuation. But there being no question in the court below that this was the property, and that Tenney was the owner of the same, and the taxes thereon were neither paid nor tendered, the action of the court in dissolving the injunction was proper. No person has a right to an injunction to restrain the collection of taxes upon any kind of property not expressly exempt from taxation without first having paid the proper amount due as taxes on the same, or paying into the court the amount of such taxes. Shares in a national bank are not assessable to the national bank, for the reason that they are not owned by the bank, and would interfere with the operations of a national agency. The shares, however, are owned by individuals, and the assessment on the same should be made to the individual owners of such shares.

BAKER, C. J.—I dissent. The territorial law is invalid, because it suffers the taxation of the shares of a national bank, and permits the taxation of the capital stock only of other banks or banking corporations. There is a manifest distinction between the shares of a corporation and its capital stock for taxation purposes, and this law is therefore, in my opinion, discriminating and unjust. *Van Allen v. Assessors*, 3 Wall. 573-581; *Bradley v. People*, 4 Wall. 459. Furthermore, paragraph 2633 of the Revised Statutes of this territory exempts the shares of all corporations from taxation, while the present statute under consideration suffers the taxation of the shares of some banking corporations only. The revenue law is therefore not uniform and equal, but is discriminating and unequal.

[Civil No. 545. Filed May 5, 1897.]

[48 Pac. 960.]

NOYES B. ALLYN, Defendant and Appellant, v. BERTHA SCHULTZ et al., Plaintiffs and Appellees.

1. MINES AND MINING—ADVERSE SUIT—REV. STATS. U. S., SEC. 2326, CONSTRUED—PLEADING—CITIZENSHIP—EVIDENCE—RULE IN SUITS TO QUIET TITLE BETWEEN INDIVIDUALS INAPPLICABLE.—In an action to adverse the party applying for a United States patent to a mining claim, under section 2326, *supra*, it is necessary to both allege and prove that plaintiffs are citizens of the United States, or have declared their intention to become such. The rule that such allegation is unnecessary applies only to an action to quiet title between individuals.
2. SAME—SAME—SAME—FORM OF ACTION.—Section 2326, *supra*, does not provide what form of action shall be brought. It may be an ejectment, a suit to try the right to real property under the statute, or an action to quiet the title, or the form ordinarily used in adverse actions.
3. SAME—PLEADING—GENERAL DEMURRER—DUTY OF COUNSEL TO CALL ATTENTION OF TRIAL COURT TO GROUND OF DEMURRER.—Where the demurrer to a complaint is general, the point upon which it is based should be called directly to the attention of the trial court. It should not be formally submitted without argument, to be overruled.
4. SAME—BOUNDARY-LINE—ESTOPPEL IN PAIS.—Where the evidence in the case shows that plaintiff, locator and owner of the New Year, the adjoining claim, pointed out to the agent of defendant the boundary-line between the Mohawk and the New Year claims, and that upon such representation defendant was induced to purchase the Mohawk, plaintiffs are estopped from questioning the correctness of the line so established.
5. SAME—SAME—SAME—RULE SAME AS IN OTHER KIND OF REAL ESTATE—BLAKE v. THORNE, 2 ARIZ. 347, 16 PAC. 271, CITED.—The rules of law relating to estoppel *in pais* apply to mining ground the same as any other kind of real estate. *Blake v. Thorne, supra*, cited.
6. SAME—SAME—SAME—PRIVY IN ESTATE BOUND.—Where, after plaintiff pointed out the boundary-line between the claims to defendant's agent, he quitclaimed an interest to another of plaintiffs, she, as a privy to the estate, is bound by the same estoppels as her grantor.
7. SAME—ACTION TO ADVERSE APPLICANT FOR PATENT—REV. STATS. U. S., SEC. 2326, AS AMENDED MARCH 3, 1881, CONSTRUED—PLEADING—NECESSARY ALLEGATIONS—PROOF—MUST RECOVER ON STRENGTH OF OWN TITLE.—In cases under section 2326, *supra*, as

amended March 3, 1881, each party is to establish his right to the mining ground in controversy against the United States as well as against his adversary. The party filing the contest should allege and prove every step necessary to establish his right to his mining claim that would be required in the land office for a patent, with the exception of advertisement and certificate of surveyor-general as to the amount of work required before patent could be obtained. He must recover on the strength of his own title, and not on the weakness of his adversary.

8. **SAME—ESTOPPEL IN PAIS—SALE OF MINING CLAIM.**—Where the evidence shows that John and Susana Bauer, two of the plaintiffs and part owners of the Mohawk claim, sold the strip of land in dispute to defendant as being a part of the Mohawk claim, they are estopped from claiming the same ground as a part of the New Year or any location, so long as the Mohawk is a valid subsisting claim.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Pinal. Owen T. Rouse, Judge. Reversed.

Statement of facts:—

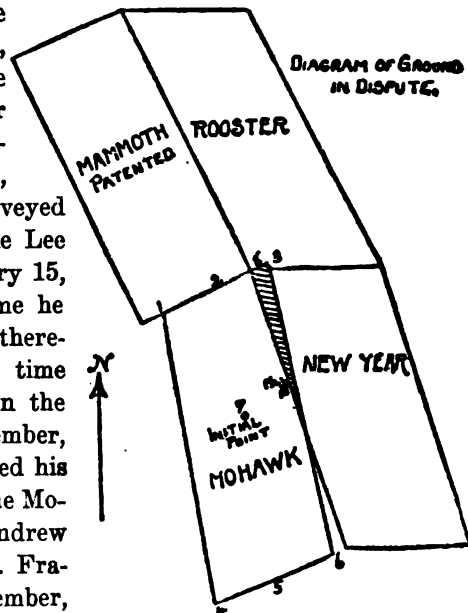
On the eighteenth day of March, 1895, Noyes B. Allyn made application before the United States land office at Tucson for a patent for the Mohawk mining claim, situated in Pinal County, Arizona. Within the time allowed by law, the appellees filed in the land office their adverse claim to a portion of the ground, asserting it to be a part of the New Year mining claim, which was owned by them. This action was brought by appellees under section 2326 of the Revised Statutes of the United States to determine their rights to the ground in conflict. The case was tried before the court below without a jury. The judgment was in favor of the plaintiffs (appellees), and the defendant (appellant) has sought this appeal.

The following diagram will show the relative positions of the Mohawk and New Year claims, and the ground in controversy.

The Mohawk claim was located on December 7, 1881, by the plaintiff Frank Schultz and one R. C. Wood. It is under this location that defendant, Allyn, claims title. The New Year claim was located on January 1, 1885, by plaintiff Frank Schultz. It is under this location that all the plaintiffs claim title. Frank Schultz sold one-fourth interest in the Mohawk to plaintiff Bauer in September, 1882, and his remaining in-

terest to one Eugene W. Aram on July 31, 1882. Since 1882 he has had no further interest in the Mohawk Mine. Wood, the other locator, conveyed all his interest to one Lee H. Newton on January 15, 1883, since which time he has had no interest therein, and since which time he has never been on the ground. In September, 1884, Newton conveyed his one-half interest in the Mohawk claim to Andrew Damm and James G. Fraser. So that in September, 1884, Damm, Fraser, and John Bauer were the owners of the Mohawk claim. In 1884,—about the time that Damm and Fraser

purchased their interest,—the plaintiff Schultz went onto the Mohawk claim with them, and pointed out to them its monuments. The monuments he then pointed out are the same as shown by figures 1, 2, 3, 4, 5, and 6, on the foregoing diagram. Schultz then explained to both Damm and Fraser that he believed the ledge swung around to the west, and for that reason he had placed the monuments of the Mohawk in that particular position. About three months after Schultz had pointed out and designated to Damm and Fraser where the monuments of the Mohawk claim were, and the boundaries of the claim had been agreed upon between them, he (Schultz) located the New Year Mine. Prior thereto the ground covered by the New Year claim was unappropriated public land, and it was unappropriated when Schultz pointed out the monuments of the Mohawk in 1884. The location notice of the New Year bears date January 1, 1885. It describes the claim as joining the Mohawk on the



NOTE — The shaded triangular strip between the Mohawk and New Year is the ground in dispute in this action. It is 945-10 feet wide at its base on the north, and is 1,100 feet long.

east. Later in the year 1885, Damm, Fraser, and Bauer, as owners of the Mohawk claim, had a survey made of the same by Gustavus Cox, a United States mineral surveyor. This surveyor erected regular mineral monuments at the points where the old monuments were. Each of these monuments consisted of a post four by four inches and four feet high, surrounded by a mound of stones. Cox also made a survey and map of the adjoining claims at the time. It shows the Mohawk Mine to be situated and located as now claimed by defendant, Allyn. The monuments so erected by Cox, Damm, and Fraser have remained there ever since. They have been known to every one as marking the boundaries of the Mohawk claim. Andy Collins, Martin Derrig, Thomas L. Bailey, Damm, Fraser, and many other witnesses testified that those monuments of posts and stones were known all around that neighborhood as the Mohawk monuments. In 1890, Thomas Armstrong, a mining engineer, was employed by the Mohawk Mining Company to make a contour map of all the claims belonging to that company, and of the adjoining claims. In making this survey, in 1890, he met plaintiff Schultz on the Mohawk Mine. Schultz then pointed out to Armstrong the monuments of the Mohawk, and Armstrong made a survey of the claim from the monuments as pointed out by Schultz. The monuments so pointed out by Schultz at that time were the identical monuments which Cox, Damm, and Fraser had erected in 1885. A few weeks later, and about August, 1890, Armstrong made a map from the surveys he then made, which map shows all the mines of the Mohawk Mining Company. It also shows the Mohawk and the New Year claims, as surveyed by him from the monuments so pointed out by Schultz. This map is in the records of this case, and shows the location of the Mohawk to be as claimed by defendant, Allyn. In January, 1892, the defendant, Allyn, procured from the plaintiffs Susana and John Bauer an option to purchase their interest in the Mohawk claim, and also the interest of their co-owners Damm, Fraser, and Stephens. The purchase price was to be twenty-five thousand dollars. At or about the time of the execution of this agreement, the said Bauer, Damm, Fraser, and Allyn, and also Thomas L. Bailey, who was agent for Mr. Allyn, met at Tucson, and had an extensive conversation about the Mohawk claim and its monuments and boundaries. At

this meeting a sketch-map was drawn, which showed the location of the Mohawk claim relative to the Mammoth and New Year. This sketch showed the Mohawk to be located in the same manner as did the map of Cox and of Armstrong, and it showed that the ground in dispute in this action was included within the limits of the Mohawk Mine. The plaintiffs Susana and John Bauer impressed on Mr. Allyn that this was a fact, and that the sketch correctly outlined the position and boundaries of the Mohawk Mine. It was further agreed at the same time that Damm should take defendant, Allyn, and Mr. Bailey out to the Mohawk ground, and show them the mine and the monuments of the claim. And both the Bauers and Fraser assured Mr. Allyn that they would stand by and indorse as correct everything that Damm showed him. This is not denied by the plaintiffs in the case. Accordingly, in January, 1892, Damm, as the representative and agent of all his co-owners, and particularly Susana and John Bauer, went out to the Mohawk claim with Allyn and Bailey. He took them around the claim, and pointed out to them each of the corner and center end monuments. These monuments were at the points marked 1, 2, 3, 4, 5, and 6 on the diagram herein. They were the same post monuments which had been erected in 1885, and were at the same places where Schultz had, in 1884, pointed out the original Mohawk monuments to Damm and Fraser. The boundaries of the Mohawk Mine as then designated and shown by Damm to Allyn and Bailey were the same as were described in the map of Cox and in the map of Armstrong, and now claimed by Allyn. Mr. Allyn then took possession of the Mohawk claim, under his option to purchase, and put Thomas L. Bailey in charge of it, and had him do development work thereon from that time on until July 15, 1892, when he bought the mine. While Bailey was thus in charge of the mine, doing work thereon,—to wit, on June 11, 1892,—and while Andrew Damm was also at the mine with him, Frank Schultz came on the ground, and took dinner with him. As he had been one of the original locators of the Mohawk claim, and as he was the sole locator of the New Year claim, and was then an owner thereof, Mr. Bailey requested him to show him the monuments of the Mohawk and the dividing-line between the Mohawk and the New Year. Schultz complied with this request. He took Bailey around the Mohawk claim, and pointed

out to him each of the corner and center end monuments of the Mohawk claim. He pointed out to Bailey the identical four by four post monuments which Cox, Damm, and Fraser had erected in 1885, and he (Schultz) told Bailey that those were the true and correct corner and center end monuments of the Mohawk claim. Mr. Bailey communicated these facts to Mr. Allyn. Bailey and Schultz then went to work to ascertain and determine the boundary-line between the Mohawk and the New Year. Schultz posted himself at the southeast corner of the Mohawk claim (figure 6 on the foregoing diagram), from which point he could distinctly see the northeast corner monument of the Mohawk (figure 3 on the diagram). Bailey started from this southeast monument, carrying with him an ocatillo stick with a rag tied at the end of it for a flag. He proceeded in the direction of the northeast monument. When about midway between the two monuments he stopped and faced Schultz, who remained at the southeast monument. Schultz motioned with his hat from one side to another until Bailey was in a direct line between the two monuments. Then Bailey stuck his stick in the ground and built a small monument of stones around it. Schultz came up, and it was agreed by him that this monument and the line sighted from the southeast and northeast monuments of the Mohawk was the correct boundary-line between the Mohawk and the New Year. The line is the line marked 3, 6, on the foregoing diagram. And so it was agreed that the New Year claim did not take in any of the ground of the Mohawk as bounded by the post monuments which Damm and Fraser had erected in 1885. Thereafter, and on July 15, 1892, Mr. Allyn, being satisfied with the value of the Mohawk Mine, and relying on the representations made to him and to his agent, Mr. Bailey, by the plaintiffs Susana and John Bauer and Frank Schultz, as to the location of the corner and center end monuments of the Mohawk claim, and believing from their representations that the monuments they had pointed out, and had caused others to point out, to him as being the true monuments of the Mohawk claim, were as a matter of fact the true monuments, he paid to the Bauers and their co-owners of the Mohawk, twenty-five thousand dollars, and they delivered to him their deed. And in this way did defendant, Allyn, buy the land in dispute in this action. Defendant, Allyn, continued extensive development work on

the claim after he purchased it; Mr. Bailey remaining as his manager. He erected, at great expense, a boiler and engine house, and placed therein a valuable boiler and engine, and he also erected a large stamp-mill, at about forty or fifty feet from the boundary-line between the Mohawk and New Year, as such boundary-line was settled and agreed upon by Schultz and Bailey. The ground in dispute is valuable to defendant, Allyn, for the use of this mill and machinery. The point where this mill is situated is shown in the foregoing diagram. The lower court rendered its judgment that the ground in dispute was part of the New Year claim; that of said claim Susana Bauer was the sole owner of an undivided three-eighths interest thereof, and that her said title to the ground in dispute be forever quieted as against the claim of defendant, Allyn. Plaintiffs introduced in evidence the deraignment of title of the New Year claim. This evidence showed that Frank Schultz was the owner of an undivided one-half interest therein, and that Bertha Schultz was the owner of the other half interest. It further showed that Susana Bauer did not have, and never did have, any interest in the New Year claim. The deraignment of title consists of: 1. Notice of location of New Year Mine by Frank Schultz, on January 1, 1885; 2. Deed from Frank Schultz to Bertha Schultz of a one-half interest in the New Year Mine, dated January 7, 1893; and 3. Notice and affidavit of forfeiture of John Haynes for non-performance of assessment work in 1893, the affidavit being made by Bertha Schultz. That is all the evidence produced on the trial to show that Susana Bauer is the owner of a three-eighths interest in the New Year Mine. There is no evidence in the case that plaintiffs are citizens of the United States or have declared their intention to become such. There is no such averment in their complaint. Judgment was rendered that plaintiff Bertha Schultz was the owner of five eighths, and plaintiff Susana Bauer was the owner of three eighths, of the New Year Mine, and that the land in dispute belonged to them. Defendant filed his motion for a new trial, which was overruled, and he has perfected this appeal.

Selim M. Franklin, for Appellant.

J. S. Sniffen, for Appellees.

HAWKINS, J. (after stating the facts).—There are numerous errors assigned, only a few of which we deem it necessary to notice. The object of this suit, it will be seen from the statement of facts, was to adverse Allyn in the obtaining of a patent to the Mohawk mining claim. The complaint does not allege, nor is it proved, that any of the plaintiffs were citizens of the United States or had declared their intention to become such. Defendant claims error in overruling the general demurrer on this account. The complaint prays that plaintiffs' title be quieted, and they (plaintiffs) claim it is not necessary to allege or prove citizenship in such a case. This claim is true in an ordinary action to quiet the title to mining claims between individuals (*Thompson v. Spray*, 72 Cal. 528, 14 Pac. 182; *Moritz v. Lavelle*, 77 Cal. 12, 18 Pac. 803; *Souter v. Maguire*, 78 Cal. 544, 21 Pac. 183), but this is not such a case. The object of this suit (being an adverse) is to quiet the title between these individuals and the United States. It will not do to say that the mere form of the complaint is to govern in this class of cases. Section 2326 of the Revised Statutes of the United States does not provide what form of action shall be brought. It may be ejectment, a suit to try the right to real property under the statute, or an action to quiet the title, or the form ordinarily used in adverse actions. Yet when it appears that the object of the suit is to adverse the party applying for a United States patent, it is necessary to both allege and prove that plaintiffs are citizens of the United States; or have declared their intention to become such. *Lee Doon v. Tesh*, 68 Cal. 43, 6 Pac. 97, 8 Pac. 621; *Anthony v. Jillson*, 83 Cal. 296, 23 Pac. 419; *Rosenthal v. Ives*, 2 Idaho 265, 12 Pac. 904. If the complaint fails to allege citizenship, it is bad on demurrer. The demurrer in this case was general, and, the record shows, was formally submitted to the court below and was overruled. It was not urged by defendant, but an exception was taken. This point should have been called directly to the court below and urged. Where a point is unquestionably well taken on demurrer, counsel should call the attention of the court to the same, so the court should have an opportunity to give it the proper consideration.

The complaint not alleging citizenship of the plaintiffs, and the evidence not proving the same, would warrant a reversal

and new trial; but in examining the entire record we have concluded to consider the whole case. The testimony of Wood, an original locator of the Mohawk mining claim, shows that when this claim was located the southerly end of the Mammoth was made the northerly end-line of the Mohawk, with monuments the same; yet monuments 1 and 3 were shifted long before any rights were acquired under the New Year location, and the location as shown by the diagram was distinctly marked on the ground, and these lines and monuments pointed out by the owners of the New Year to the agent of Allyn; and, Allyn having been induced to purchase the Mohawk by such representations, they (plaintiffs) are estopped from denying the truth of the representations made by them regarding the line between the Mohawk and New Year claims. The rules of law relating to estoppel *in pais* apply to mining ground the same as any other kind of real estate. *Blake v. Thorne*, 2 Ariz. 347, 16 Pac. 270. The facts show that Schultz pointed out the monuments of the Mohawk claim to Allyn's agent on the boundary-line between the Mohawk and the New Year claims while Schultz was the owner of the New Year; and afterwards he quitclaimed an interest to Bertha Schultz. She, as a privy in the estate, is bound by the same estoppels as her grantor. 7 Am. & Eng. Ency. of Law, p. 23, and cases cited in notes; Bigelow on Estoppel, pp. 607, 608. "A party is estopped to deny the line between his own and the adjoining land to be the true line, if he has sold and conveyed land up to such line, has pointed it out as the true line, and has induced the defendant to purchase up to such line." Hermann on Estoppel, p. 1270, sec. 1133, and authorities cited. The deraignment of title to the New Year Mine fails to show the title as found by the court. Schultz located the mine on January 1, 1885. He quitclaimed a three-eighths interest to his wife, Bertha Schultz, January 4, 1893, and made affidavit of the forfeiture of John Haynes for non-representation for 1893. No record title is shown in either of the Bauers. No judgment should have been entered in their favor. Rev. Stats. U. S., sec. 2326, as amended March 3, 1881. In this class of cases, each party is to establish his right to the mining ground in controversy against the United States as well as against his adversary. The party filing the contest should allege and prove every step necessary to establish his right to his min-

ing claim that would be required in the land office for a patent, with the exception of advertisement and certificate of surveyor-general as to amount of work required before patent could be obtained. If the proof shows no title, or that all the requirements of the law have not been complied with, he can recover no judgment. Plaintiffs must recover on the strength of their own title, and not on the weakness of that of their adversary. *Gwillim v. Donnellan*, 115 U. S. 50, 5 Sup. Ct. Rep. 1110. There was a location by Schultz which on its face seems valid. Then the other plaintiffs must, before a decree is rendered in their favor, show a title in themselves based on such location. The proof is wanting in so far as Susana Bauer is concerned. The complaint does not state facts sufficient to constitute a cause of action in an adverse in not alleging the citizenship of the plaintiffs or their intention to become such. It is nowhere shown in the evidence that plaintiffs are citizens or had declared their intention to become such. It is shown that plaintiffs John and Susana Bauer sold the strip of land in dispute to Allyn as being a part of the Mohawk claim, and they are estopped from claiming the same ground as a part of the New Year or any location, so long as the Mohawk is a valid subsisting claim. The evidence shows that neither of the Bauers ever owned any interest in the New Year claim, and that Frank Schultz represented to Allyn that the monuments of the Mohawk were at the points where defendant claims them to be, and pointed out the boundary-line between the Mohawk and New Year claims to defendant, who purchased relying on the representations of Schultz. He and Bertha Schultz, his privy in interest, are estopped from denying the truth of such representations. The ground in dispute is a part of the Mohawk claim, and was never included in the New Year location. The judgment of the lower court is reversed, with directions to enter judgment for the defendant.

Baker, C. J., and Bethune, J., concur.

ARIZONA 5-11

[Civil No. 530. Filed May 15, 1897.]

[48 Pac. 904.]

CHARLES BLACKBURN et al., Defendants and Appellants,
v. THE UNITED STATES OF AMERICA, Plaintiff
and Appellee.

1. PUBLIC LANDS—PRE-EMPTION—PATENT—CANCELLATION—KNOWN MINERALS—MINES AND MINING—REV. STATS. U. S. SEC. 2258, CONSTRUED.—Under section 2258, *supra*, the existence of salines or minerals must be known at the time of entry to defeat a patent acquired under the Pre-emption Act. A suit to cancel a patent issued under a pre-emption cash entry cannot be sustained where the evidence fails to show that any known mineral deposit of any value existed on the land in question at the date of entry, though it does appear that the land contains some mineral which has proven unprofitable to work.
2. SAME—SAME—SAME—SAME—PLEADING—IN BAR—LACHES.—A plea in bar of the lapse of time from the entry of the land to the time of the institution of a suit by the United States to cancel a pre-emption patent, showing that suit was commenced twelve years after the cause of action accrued, and that during that time innocent purchasers acquired interests in the land, should be sustained.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Yavapai. A. C. Baker, Judge. Reversed.

The facts are stated in the opinion.

Johnston & Sloan, for Appellants.

The evidence fails to show that there were any known mines before or at the time of entry and issuance of patent in 1878 upon the patented lands.

A known mine is thus defined in *Colorado C. and I. Co. v. United States*, 123 U. S. 190 (Co-op. Ed.): "It is not sufficient in our opinion to constitute 'known mines' of coal within the meaning of the statute that there should be merely indications of coal-beds or coal-fields of greater or less extent and greater or less value as shown by outcroppings. We hold therefore that to constitute the exemption contemplated by the Pre-emption Act under the head of 'known mines,' there

should be upon the lands ascertained coal deposits, of such value and extent as to make the land more valuable to be worked as a coal mine, under the conditions existing at the time, than for merely agricultural purposes. The circumstance that there are surface indications of the existence of veins of coal does not constitute a mine, or does not even prove that the land will be ever, under any conditions, sufficiently valuable on account of its coal deposits to be worked as a mine. A change in the conditions occurring subsequently to the sale, whereby new discoveries are made, or by means whereof it may become profitable to work the vein as mines, cannot affect the title as it passed at the time of the sale." See, also, defining "known mines" *United States v. Reed*, 28 Fed. 486; *Deffebach v. Hawke*, 115 U. S. 426, 6 Sup. Ct. Rep. 95.

Entry was made and patent issued in 1878. This suit was commenced in 1890. Therefore, the claim is stale, and the plaintiff has been guilty of laches, and a court of equity for that reason will refuse to cancel the patent. See *United States v. Flint*, 4 Saw. 60, Fed. Cas. No. 15,121; *United States v. Beebe*, 17 Fed. 26; *United States v. Beebe*, 127 U. S. 338, 8 Sup. Ct. Rep. 1083; *Badger v. Badger*, 69 U. S. 838; *March v. Whitmore*, 88 U. S. 485; *Hayward v. Bank*, 96 U. S. 85; *Twin Lick C. Co. v. Marburg*, 91 U. S. 328.

In *United States v. White*, 17 Fed. 565, the court says: "Although statutes of limitation do not run against the government, yet the staleness of the claim may be taken into consideration in determining whether a court of equity should interfere and grant relief where the United States as well as a natural person is a plaintiff. When the United States comes into a court of equity as a suitor, it is subject to the defenses peculiar to that court." *United States v. Tichenor*, 8 Saw. 156, 12 Fed. 449; *United States v. Flint*, 4 Saw. 58, Fed. Cas. No. 15,121; *Stearns v. Page*, 7 How. 829. "Under the state law this suit, if between private parties alone, would be barred within three years." *Manning v. San Jacinto Tin Co.*, 7 Saw. 430, 9 Fed. 726. "Six years elapsed between the issuance of the patent and the filing of the bill, and no averment is made to show that the fraud was not discovered, or by the exercise of ordinary diligence in the land office might not have been discovered immediately after its consummation."

There being no fraud or perjury committed in procurement of patent, as shown by the evidence, and the government having announced that it relied upon lack of jurisdiction, as above stated, in the interior department to issue patent, and there being no tender to defendants of purchase money paid by them, the cancellation of the patent and depriving defendants of their patent was error. The United States and its rights are controlled by the same laws by which those of individuals are governed. *Brent v. Bank*, 10 Pet. 554; *United States v. White*, 17 Fed. 565; *United States v. Budd*, 43 Fed. 634; *United States v. Minor*, 114 U. S. 233, 5 Sup. Ct. Rep. 836.

E. E. Ellinwood, United States District Attorney, and E. M. Sanford, for Appellee.

BETHUNE, J.—This is an action on the part of the United States for the cancellation of a patent issued on the fifteenth day of December, 1878, to one of appellants here for a certain tract of government land situated in Yavapai County, under a pre-emption cash entry made by said Blackburn in August of that year, on the grounds "that said land was not agricultural land, and not subject to entry except as mineral land; that the same is, and at the time of said entry was, known to be mineral land; that it has never had any value whatever as agricultural land, and is not susceptible to cultivation"; and "that Blackburn made the pre-emption entry for the fraudulent purpose of procuring a larger amount of mineral land at a smaller price than it could have been purchased for under the mineral land laws." The complaint alleges that one day after the issuance of the patent to Blackburn he conveyed the land to one Mrs. Bean, and that she and her husband knew the land to be more valuable for minerals than for agriculture, and that Blackburn was conveying the land to her in fraud of the rights of the United States. Mrs. Bean kept the land until August, 1889, when she conveyed it to one J. W. Clay, one of the defendants in this action. The record fails to show that the defendants knew of the existence of mineral in any appreciable quantity on the land at the time entry was made by Blackburn, or, in fact, until June 1, 1889, when, it is inferentially admitted by the answer, it

became known that a mine existed upon the land. Several of plaintiff's witnesses testified that they did not know that defendants had any knowledge of the mineral character of the land at the time of Blackburn's entry, and none testified that they did. The evidence relied upon by plaintiff is, in brief: That one William Pierce made a location upon what was the Hassayampa ledge in 1869 or 1870, within the boundaries of the Blackburn entry; that Pierce worked the property down to a depth of fifteen or sixteen feet through quartz which carried galena, and perhaps a little sulphur; that Pierce had abandoned his location before Blackburn's entry; that C. A. Behm, one of the witnesses for plaintiff, had examined ore on the dump, and found it valuable; that the dump was there three years prior to the trial of this case; that he had tried to exploit the mine, and could not do so because of too much water; that he (Behm) worked on the north half of the ledge, and quit work on account of the water; that no one is working there now; that he did not make any money out of it; considered the ore valuable, but did not know how much it was worth, or how much it cost to mine it; that Pierce had a windlass on the Hassayampa ledge, and worked there in 1876-1877, and that in 1878 a man prospecting there would see evidence of abandoned claims; and that, if pumping machinery be put in, and the ledge prospected thoroughly, it would pay; that E. A. Rupert, his father, and brother located the Silver King Mine in 1882 or 1883, and there was at that time a shaft on the mine; that he sorted the ore on the dump, and shipped something over a ton, which brought \$182; that he sold the Silver King to the Kansas City Mining and Milling Company, which worked the mine, and then quit it; that prior to the year 1878 one Charles Bishop raised potatoes, cabbages, corn, and other agricultural products on the land, which is a narrow strip up and down the creek, and taking in all there is of the creek bottom; that E. A. Rupert, one of plaintiff's witnesses, at the time he lived on the Silver King Mine,—from 1886 to 1889,—supported a family of from four to eight from the mine. On the part of the defense it was shown that there were different patches of land on the claim in controversy fenced in and cultivated in vegetables prior to 1878; that there were no indications of mines upon the land in 1878, but there were some prospect holes; that since 1878

those who have worked on this land seeking mines have done it at a loss; that since 1878 one of the Ruperts had worked there, and the Kansas City Mining and Milling Company had also worked the mine, but that everybody who had worked the mine found it unprofitable; that Rupert got money out of it by selling to the Kansas City Milling and Mining Company.

No lands upon which are situated any known salines or mines are subject to pre-emptions (Rev. Stats. U. S., sec. 2258), and the existence of such salines or minerals must be known at the time of entry. In the contest of *Cleghorn v. Bird*, before the department of the interior, Secretary Lamar said: "It has been repeatedly held by this department that it must appear, not that neighboring or adjoining lands are mineral in character, or that the land in dispute may hereafter possibly develop minerals in such quantity as will establish its mineral character, but that as a present fact it is mineral in character." 4 L. D. Dep. Int. 478. And this view has been adopted by the courts. *United States v. Reed*, 28 Fed. 482. From the record before us it is impossible to draw an inference that any known mineral deposit of any value existed on the land in question at the date of Blackburn's entry. It does appear that the land contains some mineral, and that the assay of ore taken from the old Pierce shaft showed sufficient value to indicate that the land might be valuable for mining, provided ore of that value could have been obtained in sufficient quantity, and extracted and worked at a profit. But the evidence on this is conclusive that every one who has worked the mine on this land has found it unprofitable.

We might rest the decision of this case on the branch of it already treated of, but there is another feature raised by the record, and pleaded as a bar to the action,—to wit, the lapse of time from the entry of the land until the institution of this action. We think this plea is well taken. The entry was made by Blackburn in 1878, and this action was brought in the year 1890,—twelve years after the cause of action accrued,—and during which time innocent purchasers acquired interests in the land. "Courts of equity will not entertain a suit to vacate a decree, even in case of palpable frauds, where there has been unnecessary delay in its introduction, and the rights of third parties have intervened in reliance upon the

decree. Consideration of public policy requires prompt action in such cases; and if, by delay in acting, innocent parties have acquired interests, the courts will turn a deaf ear to the complaining party. This is a doctrine of equity irrespective of any statute of limitations, and irrespective of the character of the suitors. It is essential that this doctrine should be vigorously upheld for the repose of titles and the security of property." *United States v. Flint*, 4 Saw. 60, Fed. Cas. No. 15,121. "Although statutes of limitation do not run against the government, yet the staleness of the claim may be taken into consideration in determining the question whether a court of equity should interfere and grant relief where the United States as well as a natural person is a plaintiff. When the United States comes into a court of equity as a suitor, it is subject to the defenses peculiar to that court." *United States v. White*, 17 Fed. 565; *United States v. Tichenor*, 8 Saw. 156, 12 Fed. 449. No doctrine of elementary law is more thoroughly established than this. Our conclusion is, that the bill in this case should have been dismissed. The judgment of the lower court is reversed, with directions to enter judgment for the defendants for their costs in this action.

Rouse, J., concurs.

Hawkins, J., having been of counsel in this case in the court below, took no part in this case in this court.

[Civil No. 438. Filed May 30, 1897.]

[50 Pac. 116.]

W. T. GRAY et al., Defendants and Appellants, v. DANIEL NOONAN, Plaintiff and Appellee.

1. OFFICE AND OFFICERS — SHERIFF — DAMAGES — CONVERSION OF PROPERTY—LEVY OF EXECUTION—EVIDENCE—ADMISSIBILITY—JUDGMENT IN FORMER ACTION WHERE MEASURE OF DAMAGES DIFFERENT.—In an action by Daniel Noonan against Gray, as sheriff, and the sureties of his official bond, for damages caused by the levy of an execution against Mrs. J. A. Noonan, on certain personal property belonging to plaintiff of the value of \$1,395, to which defendants

pleaded a general denial, a judgment-roll in a former case of plaintiff against one Gray individually which shows that such judgment was on a complaint for the value of the property and for injury to the business of plaintiff is not competent evidence of the value of the property taken, that being the sole measure of damages in the present case.

2. ~~SAME—SAME—SAME—EVIDENCE—JUDGMENT—IDENTITY OF PARTIES—~~
~~ADMISSIBILITY.~~—Where there is no evidence to show that in the judgment in a former case rendered against Gray individually the said Gray is the Gray, sheriff, named as defendant in the present suit, such judgment-roll is inadmissible.
3. ~~SAME—SAME—SAME—SAME—EXECUTION—FAILURE TO SHOW CON-~~
~~VERSION.~~—In an action against a sheriff and his sureties for conversion of property by said sheriff, where the execution under which it is alleged he took possession of the property fails to show that it was ever in his hands or those of his deputies, and there is no other evidence that such sheriff took possession of such property as an individual or at all, judgment should go for the defendants.
4. ~~SAME—SAME—OFFICIAL BONDS—SURETIES—LIABILITY FOR ACTS~~
~~UNDER COLOR OF OFFICE AS WELL AS BY VIRTUE OF OFFICE.~~—The weight of authority and the better reasons are in favor of holding the sureties on the official bond of a sheriff responsible for acts of such sheriff done *colore officii* as well as those done *virtute officii*.
5. ~~SAME—SAME—SAME—SAME—EVIDENCE—ADMISSIBILITY—JUDGMENT~~
~~AGAINST SHERIFF INDIVIDUALLY.~~—In an action against a sheriff and sureties upon his official bond for conversion of property by such sheriff, evidence of a judgment against such sheriff as an individual for the conversion of the same property is not admissible as against the sureties, the parties to such judgment alone being bound thereby.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge. Reversed.

Statement of facts:—

On July 5, 1892, the appellee, Daniel Noonan, filed his complaint in the district court of Maricopa County against the appellant W. T. Gray as sheriff of said county, on the official bond of said Gray, and against the other appellants as his sureties on said bond. Two separate causes of action were set up in said complaint. In the first cause appellee here (plaintiff below) claimed damages against the appellants here (defendants below) in the sum of \$1,395, for an alleged unlawful seizure and sale by Gray, as sheriff, under and by virtue of a certain execution issued against one J. A. Noonan,

of certain personal property claimed by plaintiff, enumerated, described, and particularly set forth in said cause of action. In the second cause of action in said complaint, plaintiff claimed damages, actual and exemplary, against defendants, in the sum of sixteen hundred dollars, for the seizure and sale, under the execution referred to in the first cause of action, of property exempt from execution, because it belonged to plaintiff, and that, as plaintiff was the head of a family, said property was exempt from execution. To said complaint, on May 29, 1893, defendant Gray filed a separate answer, setting up three distinct defenses, viz.: First, a plea of *res judicata*; second, a plea of election and estoppel; third, a general denial. In said plea of *res judicata* he alleged that on the twenty-first day of February, 1891, in an action then pending in the district court of Maricopa County between plaintiff, Daniel Noonan, and the defendant W. T. Gray, a final judgment was rendered for said plaintiff against said defendant; that said suit is numbered 1,232; that it was for the same cause of action as that now pending, and was against defendant as an individual, and not as sheriff. He further alleged as a part of said plea that the judgment in said case numbered 1,232 was final, and remained in full force. As a plea of election and estoppel, he alleged that case numbered 1,232 was against him as an individual, and not as an officer; that in that case plaintiff had judgment against defendant, as an individual, for damages for seizing and converting to his own use the same identical property for which judgment is asked in this action. The other appellants filed a joint answer, in which they set up four defenses, viz.: First, a plea of *res judicata*; second, a plea of election and estoppel; third, a plea justifying the seizure and sale under execution of the property claimed by plaintiff (appellee), for the reason that said property was the separate property of Mrs. J. A. Noonan, and not the property of plaintiff, and that plaintiff had by his conduct estopped himself from claiming any interest therein, or in claiming that said Gray had taken said property as sheriff; fourth, a general denial. Plaintiff, after the answers were filed, dismissed all the causes of action set up in his complaint, excepting the first, and filed demurrers to the answers of defendants. The demurrers were sustained, and all the defenses set up in the answers were stricken out, excepting

the general denial. The case was tried by a jury, and plaintiff offered in evidence the official bond of said Gray as sheriff of Maricopa County, on which the other defendants were sureties. Then he introduced in evidence the judgment-roll in case No. 1,232,—Daniel Noonan, Plaintiff, v. W. T. Gray, Defendant; the judgment therein being for \$1,217.77, of date February 21, 1891, with interest at seven per cent per annum, and costs at \$8.65. Plaintiff offered in evidence an execution on said judgment, with the return of the sheriff thereon as follows: "Office of Sheriff of Maricopa County. I hereby certify that I received the within execution on the 9th day of June, at 4:10 P. M., and hereby return the same not satisfied, having, after due search and inquiry, failed to find any property belonging to the within-named defendant in Maricopa County. Dated June 24th, 1892. J. B. MONTGOMERY, Sheriff, by A. Barry, Deputy." Plaintiff was then sworn as a witness, and testified that he had never been paid any part of the amount of the judgment in case No. 1,232. Plaintiff then introduced in evidence an execution dated July 7, 1890, for \$191, with interest and costs, for the amount of a judgment in a case No. 1,163 in the district court of Maricopa County, in which I. N. Jacoby and others were plaintiffs, and Mrs. J. A. Noonan defendant. This was all the evidence offered by plaintiff. The complaint of plaintiff in the judgment-roll of case No. 1,232 was an action for damages against the defendant W. T. Gray for the conversion by him of apparently the identical personal property described in the complaint in this action, for the sum of \$1,170, the alleged value thereof, and for damages for the wrongful taking of said property in the sum of six hundred dollars; and plaintiff further alleged therein that, by reason of the wrongful act of defendant, plaintiff's business had been broken up, and for that wrong he had been damaged in the further sum of five hundred dollars. For all of said damages plaintiff asked judgment for \$1,030 for the value of the said property, and for six hundred dollars as special damages. After the close of the evidence the court instructed the jury to return a verdict for the plaintiff for the sum of \$1,217.77, the amount of the judgment in case No. 1,232, with interest thereon at seven per cent per annum from the date of said judgment, viz.: February 21, 1891. A verdict was returned in accordance with said in-

struction, and judgment entered accordingly, from which defendants appeal.

W. H. Williams, Cox & Street, and J. F. Moriarty, for Appellants.

Perley & Hancock, for Appellee.

ROUSE, J. (after stating the facts).—This is an action by Daniel Noonan on the official bond of W. T. Gray, as sheriff of Maricopa County, against said Gray and his sureties on said bond, for damages caused by the levy of an execution, in a case against one Mrs. J. A. Noonan, on certain described personal property, alleged to be the property of plaintiff, of the alleged value, in the aggregate, of \$1,395, and taking, carrying away, and converting said property to the use of said Gray. Plaintiff further alleged as a second cause of action that he was the head of a family, and claimed the property as exempt from execution. He further alleged that he had recovered a judgment against said Gray in case No. 1,232 for the sum of \$1,217.77, for damages which plaintiff had sustained by the unlawful seizure and sale of the said personal property; that execution had been issued thereon, and returned, "No property found"; that defendant Gray was insolvent and worthless; and that no part of said judgment had been paid, to plaintiff's damage in the sum of fourteen hundred dollars. The plaintiff dismissed his second cause of action, and demurrers having been sustained to the defendants' answer, leaving as defenses thereto the general denial only, the trial was had on the complaint as thus amended, and defendants' general denial. The only evidence offered of the value of the property described in the complaint and the damages sustained by plaintiff was the judgment-roll of said case No. 1,232, in which case a judgment for \$1,217.77 was rendered. Said judgment was rendered on a complaint which alleged the value of the property therein described to be \$1,170; damages for taking the same, six hundred dollars; and the damages to plaintiff's business in the sum of five hundred dollars. The damage sustained as alleged in this complaint is the value of the property taken. The said judgment-roll shows that the judgment in that case was on a complaint for the value of the property, and for injury to

business of plaintiff, etc. Said judgment-roll does not show the value of the property. The measure of damage in this case is the value of the property. That is the measure of damages ordinarily. Mechem on Public Officers, secs. 774, 783. There is no evidence in the record that Gray, as sheriff, took the property described in the complaint, or any part of it. The execution introduced by plaintiff in evidence, issued on the judgment in case No. 1,163 against Mrs. J. A. Noonan, on which it is alleged in this complaint that the property of the plaintiff was seized by Gray, does not show that it was ever in the hands of Gray or of any of his deputies, and there is no other evidence that Gray took possession of said property as an individual, or as an officer, or at all. Without such proof the judgment should have been for the defendant. The judgment-roll in case No. 1,232 shows that that action was against Gray as an individual, for damages caused by his acts as an individual, in taking and carrying away the personal property of plaintiff, and for other damages caused by Gray's personal conduct. That judgment, without evidence to connect it with the suit at bar, should not have been given to the jury. There is nothing in this record to show that the Gray in the suit referred to is the same individual who is one of the defendants in this case. The identity of the said individual was stricken out by the demurrers to the respective answers. There is no evidence in this case that the property described in this complaint was taken from plaintiff by Gray in person, or by a deputy, or that plaintiff had been deprived of said property by any one. There is no evidence of any value of said property, or of any damages to it, or of any conversion thereof. The judgment-roll in case No. 1,232 shows that a judgment was rendered for \$1,217.77 in a case in which one Daniel Noonan was plaintiff and one W. T. Gray was defendant; that certain described property was taken, of a certain value; that certain damages were sustained. But there is nothing to show what part of the judgment was for the value of the property, or what part was for the damages claimed in said complaint. The present suit is for damages based on the value of certain personal property described in the complaint, alleged to have been taken from plaintiff by W. T. Gray as sheriff. Said judgment-roll shows that said action and judgment were against Gray as an individual;

hence, without evidence to connect said judgment with the allegations in this complaint, said judgment-roll was not evidence in this case.

A distinction has been made between the acts of officers. Certain acts are said to be done *virtute officii*, and others *colore officii*. For acts of the latter class it is held in many states that the sureties are not responsible. Where a sheriff with an execution against A seizes the property of B, the said act is of the latter class. The weight of authorities and the better reasons are in favor of holding the sureties responsible for acts falling under that class also. But the contract of sureties upon an official bond is subject only to the strictest interpretation. *Detroit Sav. Bank v. Ziegler*, 49 Mich. 157, 43 Am. Rep. 456, 13 N. W. 496; *United States v. Boyd*, 15 Pet. 187. Their liability is to be limited to the official acts of the principal only, and is by no means an undertaking against every act that he may chance to commit. *Gerber v. Ackley*, 37 Wis. 43, 19 Am. Rep. 751; *State v. Davis*, 88 Mo. 585; *Clark v. Lamb*, 76 Ala. 406. The sureties do not bond themselves against every act of their principal. It is an official act, a failure to perform an official duty, or performing it in an improper manner, which comes within the scope of the sureties' undertaking. For acts not within the line of official duty and authority, not under color of office, the officer may incur personal, not official, responsibility. *Gerber v. Ackley*, 37 Wis. 43, 19 Am. Rep. 751. In that personal responsibility the sureties on his official bond are not involved. *Gerber v. Ackley*, 37 Wis. 43, 19 Am. Rep. 751; *State v. Conover*, 28 N. J. L. 224, 78 Am. Dec. 54. Excepting the description of the property and the name of the plaintiff in the judgment-roll in case No. 1,232 and the complaint in this action, the name "W. T. Gray" in both actions as a defendant, there is nothing in the record to connect said judgment-roll with the suit at bar. If, however, the conclusion should be that there were facts in evidence sufficient to show that the Gray in both cases was the same individual, and the property described in both actions was the same property, still, for the reason that this action is for damages for the value of the property taken, and the judgment in said case No. 1,232 was for damages other than for the value of the property, it was error to instruct the jury to find a judgment in this case for

the value of the property in the amount of the judgment in said case No. 1,232. The only judgment that could have been given in the case at bar would have been one for the value of the property according to the allegations of the complaint and the evidence on the trial. Again, the suit and judgment in case No. 1,232 were against Gray as an individual. It was such an action as plaintiff had the right to maintain against Gray as an individual. The wrongs complained of therein were such as Gray as an individual could perform. It was therefore an action in which the other defendants were not concerned. The parties thereto alone were bound by it. It was not a necessary proceeding to establish plaintiff's claim on Gray's bond, or a prerequisite to plaintiff's right of action on the bond; hence, whatever may be held as the rule with reference to the weight to be given to a judgment against the principal, and offered in evidence in an action against the sureties, this judgment was not evidence in the case at bar. If it had been a judgment against Gray as sheriff, or for acts alleged to have been performed by him as sheriff, then it would be necessary to determine the effect of said judgment, and whether it was proper and effectual as a plea of *res judicata*. A judgment against a sheriff cannot be offered in evidence in a suit against his sureties on his bond. *Pico v. Webster*, 14 Cal. 203. We hold that in order to sustain the judgment in this case the evidence must be sufficient to support the allegation of the complaint without the aid of the judgment-roll in case No. 1,232. With this view of the case, it is not necessary for us to determine whether the action in case No. 1,232 constituted an election of remedies by plaintiff, and as such worked an estoppel. Neither is it necessary to decide whether or not, after plaintiff has recovered his judgment against a sheriff, he can thereafter maintain an action against him and the sureties on his bond jointly. The judgment of the district court is reversed, and the case is remanded for a new trial.

BETHUNE, J.—I concur in the foregoing opinion and judgment reversing the judgment of the lower court. I do not concur in the broad, unqualified proposition that a judgment against a sheriff cannot in any case be offered in evidence in a suit against his sureties on his official bond.

[Crim. No. 94. Filed May 31, 1897.]

[51 Pac. 145.]

CHARLES C. WAGONER, Defendant and Appellant, v.
THE TERRITORY OF ARIZONA, Plaintiff and Re-
spondent.

1. CRIMINAL LAW—MURDER—EVIDENCE—DYING DECLARATIONS—FOUNDATION—SUFFICIENCY.—Testimony that decedent passed witness's house, one hundred and fifty feet from decedent's home, five or ten minutes before witness heard shots in that direction, and that immediately witness opened the door and heard decedent at witness's gate calling him; that decedent came to witness's house and sank down on the ground apparently badly wounded; that witness assisted decedent to lie down and called for help; that decedent exclaimed at the time, "I am shot through and through," "I am full of blood and can't live ten minutes"; that decedent then made a statement as to how the shooting occurred, and immediately afterwards became unconscious and so remained until he died, an hour and a half later, coupled with other testimony showing that defendant and decedent's wife were at decedent's home, occupying suspicious relations, at the time he entered, is sufficient foundation for the introduction of such dying declarations.
2. SAME—SAME—SAME—SAME—SAME—MUST BE MADE UNDER SENSE OF IMPENDING DEATH.—It is essential to the admissibility of dying declarations, and is a preliminary fact, to be proven by the party offering them in evidence, that they be made under a sense of impending death; but it is not necessary that they should be stated at the time to be so made. It is enough if it satisfactorily appears in any mode that they were made under that sanction. The length of time which elapsed between the declaration and death furnishes no rule for the admission or rejection of the testimony, though it may serve as evidence as to deceased's belief that his dissolution was or was not impending.
3. SAME—SAME—EVIDENCE—INSTRUCTIONS—DEFENDANT TRESPASSER.—An instruction, based upon evidence tending to show that at the time of the shooting defendant was at deceased's house occupying suspicious relations with deceased's wife, using the expressions "a trespass" and "a trespasser" with reference to the conduct of the defendant, and with reference to the defendant being at the house, is proper.

HAWKINS, J., dissenting.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Apache. John J. Hawkins, Judge. Affirmed.

The facts are stated in the opinion.

W. T. Johnston and Robert E. Morrison, for Appellant.

Francis J. Heney, Attorney-General, and T. G. Norris, for Respondent.

ROUSE, J.—Appellant was indicted in the district court of Apache County in April, 1893, and accused of the crime of murder in the killing of one Ike Lee. He pleaded not guilty, and at the April term, in 1894, of said court, was tried, found guilty of murder as charged in the indictment, and sentenced to the territorial prison for forty years. A motion to set aside the verdict and for a new trial was made by defendant, for the reasons: 1. That the court erred in admitting in evidence declarations of the deceased, as dying declarations; 2. That the court erred in refusing a certain instruction requested by defendant, and in modifying certain instructions requested by him, and in giving certain instructions requested by the prosecution, and also on its own motion; 3. That the verdict is against the law, and not sustained by the evidence; 4. That the court erred in permitting the district attorney to use a diagram of his own making, not in evidence, in his closing argument to the jury. Said motion was overruled, and defendant duly excepted, and appeals, and assigns as error the said several points urged for a new trial.

The evidence discloses the fact that defendant was seen in Ike Lee's house, in Holbrook, in the early part of the night of the ninth day of November, 1892. Defendant and Mrs. Lee, the wife of deceased, were occupying chairs, facing each other, so close together that he had his foot on her chair, and was leaning forward towards Mrs. Lee, who was sitting erect. They were conversing with each other. The witness who saw the parties in that position testified that after he had walked about one hundred yards, he heard some shots or reports of some kind of firearms. One witness, a Mr. Bowman, testified that he resided about one hundred and fifty feet from Ike Lee's house, on November 9, 1892; that after he had retired for the night, and about half-past eight o'clock P. M., he heard some one walking by his house, and he got up to see who it was. It being dark, he could not see the person who was walking by, and he inquired who it was, and the person responded,

and witness knew by the voice that it was Ike Lee's, and from his voice and movements he judged he was in good condition physically. Witness returned to his bed, and in a short time, perhaps five or ten minutes, he was startled by the reports of three shots from some kind of firearms, exploded in the direction of Lee's house in quick succession. Witness got up immediately, and opened his door, and then heard Lee, at witness's gate, calling him. Witness's gate, where Lee was when he called witness, was about twenty-five feet from witness's house. Lee entered the gate, came to the house, and sank down upon the ground, apparently badly wounded. His condition was such, or his actions were such, as to cause the witness to believe that he was badly injured, and witness, acting on such belief, assisted him to lie down, and called for help. Lee exclaimed at the time, "I am shot through and through"; "I am all full of blood, and can't live ten minutes." He also exclaimed, in effect, "I am shot through the body." The witness testified that from the time he heard the shots until Lee was heard at his gate it was a very short time, not more than one minute or two minutes; as soon as Lee arrived at witness's house and witness observed his condition, he called for help to take Lee into the house; that help came immediately; that Lee made the exclamations above mentioned before the help arrived. Witness then testified that they took up Lee, and carried him into the house, and that immediately he became unconscious, and remained so until he died, which was about one and one half hours thereafter. The court then permitted the witness to testify as to the statements made to witness by Lee as to who shot him, and as to how it occurred, as dying declarations.

It is essential to the admissibility of dying declarations, and is a preliminary fact to be proven by the party offering them in evidence, that they were made under a sense of impending death; but it is not necessary that they should be stated at the time to be so made. It is enough if it satisfactorily appears in any mode that they were made under that sanction; whether it be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of the medical or other attendants, stated so to him, or from his conduct, or other circumstances of the case, all of which are resorted to in order to ascertain

the state of declarant's mind. 1 Greenleaf on Evidence, 11th ed., sec. 158; *State v. Nocton*, 121 Mo. 537, 26 S. W. 551; *People v. Taylor*, 59 Cal. 640; *People v. Gray*, 61 Cal. 164, 44 Am. Rep. 549; *State v. Evans*, 124 Mo. 397, 28 S. W. 8. Immediately after the declarations were made, the declarant was placed upon a cot, and almost instantly became unconscious, and remained that way until his death, which occurred about one and one half hours thereafter. The length of time which elapsed between the declarations and the death of declarant furnishes no rule for the admission or rejection of the evidence, though, in the absence of better testimony, it may serve as one of the exponents of the deceased's belief that his dissolution was or was not impending. 1 Greenleaf on Evidence, 11th ed., sec. 158.

We think the dying declarations, under the showing made, were properly admitted in evidence. Those declarations, in effect, were that declarant, when he got home, found defendant and another in his house; that he ordered them away; that they got into a quarrel; that defendant took declarant's pistol away from him, and shot at him three times, hitting him with the second shot. When asked why defendant shot him, Lee replied, "You know why." The evidence disclosed the fact that Lee had left home the morning before he was killed, for his work, which, in the nature of things, was expected to keep him from home for some time. We know nothing from the record of Lee's movements during the day, or where he was from an early hour in the day until after dark. He was then seen within one hundred and fifty feet of his house, and less than ten minutes before he was shot. We know from the evidence that about the time Lee was seen defendant was in Lee's house with Lee's wife, occupying suspicious positions with reference to each other. What Lee saw when he got home is not disclosed by the record. By his dying declarations we learn that defendant was there, and was ordered away; that defendant secured Lee's pistol, and shot at Lee three times; that Lee was wounded unto death. Lee's house was examined next day, and it bore the physical evidences of having been recently the scene of an altercation in which firearms had been used. The visit of defendant to Lee's house, after night, and in Lee's absence, and when it was to be reasonably supposed that he was to be absent for several days,

and the positions in which Mrs. Lee and defendant were seen relative to each other, lead us to believe that Lee's answer to the question, "What did he shoot you for?" that "You know why," was an intelligent and pointed answer, and one readily and easily understood.

Counsel complains of the instructions in which the learned judge used the expressions "a trespass" and "a trespasser," with reference to the conduct of the defendant, and with reference to the defendant being at Lee's house. Under the facts disclosed by the record, we feel that the judge should be commended for the use of those expressions, which were so exceedingly charitable towards the defendant. The evidence was sufficient to warrant the verdict, and, there being no error committed on the trial, the judgment should be affirmed; and it is so ordered.

Baker, C. J., and Bethune, J., concur.

Hawkins, J., dissents.

[Civil No. 541. Filed June 1, 1897.]

[48 Pac. 1009.]

RHODA P. GREEN et al., Defendants and Appellants, v.
E. D. TUTTLE et al., Plaintiffs and Appellees.

1. **PRINCIPAL AND AGENT—ATTORNEY IN FACT—AGENCY—REVOCATION BY DEATH OF PRINCIPAL—DEED—VOID.**—A deed executed by an attorney in fact after the death of his principal is void.
2. **REAL PROPERTY — DEED — FRAUDULENT REPRESENTATIONS—VOID.**—Where it appears that a wife, under the belief that her husband was still living, joins in the execution of a deed made by her husband's attorney in fact, at the request of such attorney in fact, he having knowledge of the death of the husband, and representing to the widow that it was the husband's wish that she should sign it, such deed is void.
3. **SAME—COMMUNITY PROPERTY—CONVEYANCE BY HUSBAND—NECESSITY OF WIFE JOINING—REV. STATS. ARIZ. 1887, PAR. 2102, CONSTRUED.**—Real estate which was community property, and held in the name of the husband alone, and over which he had entire control, could

be sold and conveyed by him without his wife joining in the deed as fully as though she had joined. Par. 2102, *supra*.

4. SAME—DOWER—ACT OF CONGRESS OF MARCH 3, 1887, CHAP. 397, SEC. 18, HAS NO APPLICATION IN THIS TERRITORY.—There is no dower in this territory and section 18, *supra*, providing for the release of dower has no application therein.
5. SAME—DEED—CONSIDERATION—NECESSITY FOR.—A deed without consideration is void.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Graham. Owen T. Rouse, Judge. Reversed.

Statement of facts:—

This action was commenced by appellees, plaintiffs below, in the district court of Graham County, Arizona, by complaint filed March 8, 1895, asking that the title to certain lands therein described, amounting to one hundred and twenty acres, be adjudged to appellees, alleging that appellant and her co-defendants claimed an interest therein adverse to appellees. Appellant, for herself, and as administratrix of John S. Green, deceased, and as guardian of her co-defendants, Rees Green, Harry Green, and Halis Green, by her pleadings asserted a claim to said lands, asking that the title of the same be adjudged to defendants. Judgment was rendered against appellant, and in favor of appellees, for one half of said lands, and in favor of minor heirs for the remaining half. From this judgment appellant brings her appeal. The pleadings show that John S. Green and appellant were, or had been, husband and wife; that appellant was administratrix of the estate of her husband, deceased, and guardian of Rees Green, Harry Green, and Halis Green, minor children of appellant and John S. Green; that said lands were conveyed to the husband, July 28, 1890; that the lands were held by John S. Green on November 30, 1891, and were community property; that on December 30, 1891, said one hundred and twenty acres were conveyed to Sheriff Marshall by deed of appellant joined with deed of Lyman Follett, alleged attorney in fact of John S. Green. The foregoing facts are disclosed and admitted by the pleadings. The evidence shows: Appellant was born June 16, 1872, and was married April 16, 1887; that her husband, John S. Green, was dead at date

of deed to Marshall, December 30, 1891, and admitted as proved by appellees; that appellant and her co-defendants received no consideration for said lands, or deed therefor, and that no consideration was paid therefor by Marshall or any one in his behalf; that appellant was induced to make said deed by false and fraudulent representations of said Follett that it was the wish of her husband that she sign the same. The foregoing facts were alleged by defendants, and fully shown by the evidence.

Wiley E. Jones, and W. H. Barnes, for Appellant.

It is contended for appellant that—1. Said lands being community property, not “held by her in her own right,” her deed therefor was void; 2. Appellant was a minor and unmarried at the time of her deed with Follett to Marshall, then being but nineteen years of age, and she had no power whatever to convey any lands or estate therein, and her deed was void; 3. Appellant’s deed was without consideration and was void.

Appellees claim that the Marshall deed is valid under whatever authority appellant derived from paragraph 225 of the Revised Statutes of Arizona, which reads as follows: “Married women of the age of seventeen years and upwards may convey and transfer lands or any interest or estate therein, vested in or held by them in their own right, without being joined by the husband in such conveyance, as fully and perfectly as they might do if unmarried.” But the lands in controversy are community property. “No doctrine is firmer settled by the courts of the various community states, than that all property purchased during coverture, whether taken in the name of the husband or that of the wife, or in their joint names, is to be deemed *prima facie* to belong to the community.” Ballinger on Community Property, sec. 162; *Lott v. Keach*, 5 Tex. 394; *Edrington v. Mayfield*, 5 Tex. 363; *Schuler v. Savings and Loan Society*, 64 Cal. 397, 1 Pac. 479; *Althof v. Conheim*, 38 Cal. 230, 99 Am. Dec. 363; *Metcalf v. Clark*, 8 La. Ann. 286.

The property described in deed by appellant and Follett to Marshall, being community property, was not embraced in the property described under paragraph 225 of the Revised Statutes,—to wit, held by her “in her own right.” She held whatever interest she had through her husband, by virtue of the

marriage relation. Property described in her deed could be conveyed under paragraph 2102 of the Revised Statutes, "by the husband only."

Paragraph 225 describes what in law is "separate property" of the wife.

In *Kinner v. Walch*, 44 Mo. 65, the court held that separate property of the wife was owned in her own right, and that it was exclusively hers, as expressed by the court.

"No particular form of words is necessary to vest property in a married woman for her separate use." *Clark v. Maguire*, 16 Mo. 302; *Prout v. Roby*, 15 Wall. 471; *Nixon v. Rose*, 12 Gratt. 425; *Porter v. Bank*, 19 Vt. 410; *Lyon v. Knott*, 26 Miss. 548.

"The power given to a married woman to contract in regard to her separate property does not extend to property held by her and her husband jointly." *Speier v. Opfer*, 73 Mich. 35, 16 Am. St. Rep. 556.

W. M. Lovell, and C. E. Moorman, for Appellees.

HAWKINS, J. (after stating the facts).—Numerous errors are assigned, but it is not necessary to notice any except (1) that the lands being community property, not held by the appellant in her own right, her deed was void; and (2) her deed was without consideration, and was void. The deed in this case was intended to be the deed of John S. Green. When it was executed by Follett, his alleged attorney in fact, and joined in by his wife, John S. Green was dead. It was therefore void. His widow, supposing he was alive, at the request of Follett, joined in the execution of the deed. It was not intended that she was signing the deed as the widow of John S. Green, but as his wife. Under paragraph 225 of the Revised Statutes "married women of the age of seventeen years or upward may convey or transfer lands, or any estate or interest therein, vested in or held by them in their own right, without being joined by the husband in such conveyance, as fully and perfectly as they might do if unmarried." The lands in controversy are community property. They were under the control of the husband. He could convey without the necessity of the wife joining in the deed. The above section relates solely to the separate property of the

wife. In the present case she had made no conveyance of her separate property,—she had simply joined in a deed which she supposed her husband was executing. It was in no sense her deed. The law does not make a person do one thing when he intends to do another. Her name was not necessary to a deed from her husband to community property. It neither added anything to, nor took anything from, the validity of the deed. When this deed was executed Green was dead, and it was entirely void, and this real estate descended to the widow and children charged with the debts of the deceased. If there was a mortgage upon the real estate, it should have been presented to the estate and foreclosed in the manner designated by the statute. “No doctrine is firmer settled by the courts of the various community states than that all property purchased during coverture, whether the conveyance be taken in the name of the husband or that of the wife, or in their joint names, is to be deemed *prima facie* to belong to the community.” Ballinger on Community Property, sec. 162, and authorities cited. “The power given to a married woman by statute to contract in regard to her separate property does not extend to property held by her and her husband jointly.” *Speier v. Opfer*, 73 Mich. 35, 16 Am. St. Rep. 556, 40 N. W. 909. The real estate in question was community property, and held in the name of the husband alone. During his life he had entire control over it, and could sell and convey it without his wife joining in the deed. Rev. Stats. 1887, par. 2102. If when appellant signed this deed she did so thinking she was releasing dower, under section 18 of chapter 397 of the act of Congress of March 3, 1887, it passed no title from her, for the reason that there is no dower in this territory, and said section of said act of Congress applied to the territory of Utah only, and not to the other territories of the United States. *France v. Connor*, 161 U. S. 65, 16 Sup. Ct. Rep. 497. The only object of Follett in getting the deed signed by appellant, he knowing that Green, her husband, was dead, must have been with the intent of fraudulently getting the legal title out of Green and his wife. The legal title was in Green. Death had revoked his power of attorney to Follett; hence, when Follett executed the deed as the attorney in fact of Green, no title passed. Mrs. Green was deceived into signing the deed, and if it is contended that the interest she inherited

from her husband was conveyed, which seems to be the view taken by the court below, she received no consideration for the conveyance.

As stated, other errors are assigned, and the one which seems most strongly relied on by appellant is the alleged minority of appellant at the time she signed the deed. We do not think this question very material to the issues. Her marriage had emancipated her so far as her separate estate was concerned. But the property in question was not her separate estate. She signed the deed under mistake, misrepresentation, and fraud. No title passed from Green, and her signing the deed as the wife of Green did not convey any interest she owned in the land as the widow and an heir at law of her husband. The judgment is reversed, and the cause remanded.

Baker, C. J., and Bethune, J., concur.

[Criminal No. 114. Filed July 20, 1897.]

[50 Pac. 30.]

JOHN O. DUNBAR, Defendant and Appellant, v. TERRITORY OF ARIZONA, Plaintiff and Respondent.

1. CRIMINAL LAW—LIBEL—REV. STATS. ARIZ. 1887, PENAL CODE, PARS. 405, 1818, 1833, CITED AND CONSTRUED—JUDGMENT—IMPRISONMENT TILL PAYMENT OF FINE—VOID—ILLEGAL IMPRISONMENT—NEW TRIAL—DISMISSAL.—Paragraph 405, *supra*, provides: "Every person who willfully, and with a malicious intent to injure another, publishes or procures to be published any libel, is punishable by a fine not exceeding five thousand dollars or imprisonment in the territorial prison not exceeding one year." Paragraph 1833, *supra*, provides that if the judgment be a fine, the fine can be collected by an execution issued upon such judgment, as on a judgment in a civil case. Paragraph 1818, *supra*, provides: "A judgment that the defendant pay a fine, may also direct that he be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which must not exceed one day for every dollar of the fine." Under the statutes a judgment upon conviction for criminal libel that the defendant "be fined in the sum of one thousand dollars, and that he be delivered or remanded to the custody of the sheriff of the county of Pima, territory of Arizona, until said fine is paid," is void, and it appear-

ing that defendant under said judgment has been compelled to perform a part of said illegal judgment, he cannot be tried again, and the case will be dismissed.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. Joseph D. Bethune, Judge. Reversed.

The facts are stated in the opinion.

W. M. Lovell, and Barnes & Martin, for Appellant.

Thomas D. Satterwhite, Attorney-General, for Respondent.

ROUSE, J.—Appellant was indicted in Pima County for libel, tried, and convicted. It was alleged in the indictment that John O. Dunbar, on the twelfth day of October, 1893, at the county of Maricopa, territory of Arizona, was the editor of a certain newspaper, known as the Weekly Gazette, a newspaper of general circulation in said county of Pima, and also throughout the United States of America; that on said twelfth day of October, 1893, said Dunbar published, and caused to be published, in said paper of and concerning Francis J. Heney, William K. Meade, Charles M. Bruce, and Louis C. Hughes the following: "Heney, Meade, Bruce, Hughes et al. paid \$200 for Washington dispatches to defeat Sam Webb, and made all kinds of ridiculous charges against him. Yet the senate, in executive session, consisting of fifty-five members, voted unanimously for Mr. Webb's confirmation. This shows the strength of the gang of hoodoos with decent people. Vale patronage-peddlers, land-grant sharks, assassins, and looters." Defendant demurred to the indictment, and for grounds of demurrer urged that it did not appear from the indictment that the paper in which said alleged libelous matter was printed had been circulated in Pima County, or read by any one in said county, and for that reason contended that the district court of said county had no jurisdiction of the case; that there were several offenses charged, or attempted to be charged, in the indictment,—viz., a libel of Heney, a libel of Meade, a libel of Bruce, and a libel of Hughes; that there were not allegations sufficient to show that the Heney mentioned in the article was Francis J. Heney, that the Meade was William K. Meade, that the Bruce was Charles M. Bruce,

and that the Hughes was Louis C. Hughes. The demurrer was overruled, and defendant duly excepted. The defendant then entered a plea of not guilty, the cause was tried, and a verdict of guilty was returned, on which the court rendered the following judgment: "It is therefore ordered, adjudged, and decreed that the said John O. Dunbar be fined in the sum of one thousand dollars, and that he be delivered or remanded to the custody of the sheriff of the county of Pima, territory of Arizona, until said fine is paid." The defendant was then remanded to the custody of the sheriff of the said Pima County.

Paragraph 405 of the Penal Code is as follows: "Every person who willfully and with a malicious intent to injure another, publishes or procures to be published any libel, is punishable by fine not exceeding five thousand dollars or imprisonment in the territorial prison not exceeding one year." The only punishment that can be imposed on one convicted of the crime of libel is either imprisonment in the territorial prison (penitentiary) or a fine. Both punishments cannot be imposed, and the imprisonment cannot be at any place other than the territorial prison. The judgment could have been that defendant be imprisoned, and, if that had been the judgment, the defendant would have been imprisoned in the territorial prison (par. 405, *supra*); or the judgment could have been that he pay a fine (*id.*). If the judgment had been that defendant pay a fine, the fine could be collected only by an execution issued upon such judgment, as on a judgment in a civil case. Pen. Code, par. 1833. No imprisonment could be imposed on such a judgment. To warrant imprisonment on a judgment imposing a fine in a case providing for only a fine or imprisonment, not both, it is necessary that in the judgment it be specified that the defendant be fined and imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which must not exceed one day for each dollar of the fine. The statute regulating such cases is as follows: "A judgment that the defendant pay a fine, may also direct that he be imprisoned until the fine be satisfied, specifying the extent of imprisonment, which must not exceed one day for every dollar of the fine." Pen. Code, par. 1818. In this territory the juries do not fix the punishment. By their verdicts they only pass on the guilt or innocence of

the accused. If the verdict be "Guilty," the court, in its judgment, fixes the punishment. In this case the judgment could have been that defendant be imprisoned in the territorial prison (penitentiary), or that he pay a fine in any sum not exceeding five thousand dollars, or that he pay a certain fine not exceeding the sum of five thousand dollars, and that he be imprisoned until the fine be satisfied, not to exceed one day for each dollar of the fine. The respective judgments could only be enforced as follows: If for imprisonment, by the defendant being confined in the territorial prison. If such had been the judgment, defendant could not have escaped imprisonment by paying a fine. If the judgment had been for a certain fine, then the judgment could only have been enforced by an execution, as in a civil case, for the amount of the fine. Under such a judgment the defendant could not satisfy it by submitting to imprisonment. If the judgment had been that the defendant pay a certain fine, and that he be imprisoned until the fine be satisfied, not to exceed one day for each dollar of the fine, said judgment could not have been enforced in any other way than by imprisonment of the defendant, unless the defendant should elect to pay the fine. In other words, no execution could be issued for the collection of said fine. Under a judgment such as last mentioned the court may allow the defendant a credit of any amount for each day's imprisonment, not less than one dollar. Under such a judgment a defendant may remain in imprisonment, and thus satisfy the judgment, or elect to pay the amount of the fine at the time of the judgment or at any time thereafter, crediting the amount of the fine by the amount due him for the number of days he shall have been in prison, at the rate fixed in the judgment for each day. The statute (Pen. Code, par. 1834) is as follows: "If the judgment is for imprisonment, or a fine, and imprisonment until it be paid, the defendant must forthwith be committed to the custody of the proper officer, and by him detained until the judgment is complied with." By the record in this case it is shown that the defendant was placed in custody of the sheriff of Pima County, and under said judgment is now constructively in his custody. We hold that the judgment in this case is void, and must be reversed, and, as the defendant has been compelled to perform a part of said illegal judgment, he cannot be again tried for said offense.

There are many questions in the record urged as error, but we do not deem it necessary that we should express any opinion on them. It is ordered that the judgment be reversed, and the case be dismissed.

Hawkins, J., concurs.

BAKER, C. J., dissenting.—While I agree that the judgment should be reversed, and a new trial ordered, this court cannot dismiss the whole case. I furthermore think it improper to print the libel in the record. It is not at all necessary to any part of the opinion.

[Civil No. 477. Filed July 20, 1897.]

[50 Pac. 31.]

NELLIE A. SULLIVAN et al., Plaintiffs and Appellants, v.
WILLIAM GARLAND et al., Defendants and Appellees.

1. MALICIOUS PROSECUTION—SLANDER AND LIBEL—COMPLAINT—SUFFICIENCY—DUPLICITY—MULTIFARIOUSNESS.—A complaint that defendants made, presented, subscribed, and swore to before the justice of peace a criminal complaint in writing against plaintiff, wherein defendants falsely, maliciously, and without any reason or cause accused her of having committed a felony; that a warrant for plaintiff was issued by said justice, upon which she was arrested by the sheriff of said county and carried before said justice, by whom she was arraigned and examined upon said charges and was promptly discharged; that said accusation, complaint, and each and every allegation thereof were and are false, malicious, and without probable cause, states facts sufficient to constitute a cause of action for malicious prosecution, and is not subject to demurrer for duplicity and multifariousness in that it attempts to join a cause of action for malicious prosecution and an action for slander and libel.

HAWKINS, J., dissenting.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Graham. Owen T. Rouse, Judge. Reversed.

The facts are stated in the opinion.

E. J. Edwards, and John McGowan, for Appellants.

The complaint states facts sufficient to constitute a cause of action, and for the purpose of this demurrer these facts are admitted. A complaint always shows a cause of action when its averments of fact show (1) a primary or legal right belonging to plaintiff, (2) an infringement of such right by defendant, and (3) damage in consequence to plaintiff. Pomeroy on Code Remedies, sec. 549.

In injuries to character—i. e. malicious prosecution, libel, and slander—the first element, the legal right, is presumed (Cooley on Torts, pp. 31, 225), and hence need not be alleged. Bliss on Code Pleading, sec. 175.

The complaint sets up a cause of action for malicious prosecution, the only essentials of which are, (1) the institution of such prosecution by defendant against plaintiff, (2) its termination before bringing the civil action therefor, (3) that the prosecution was without probable cause, (4) that it was malicious, (5) unless the words are objectionable *per se*, resulting damage to the present plaintiff. This complaint contains all these elements, although an averment of damages was unnecessary, the words being actionable *per se*.

By demurring on the merits for the insufficiency of facts, defendants waived their formal objection of misjoinder set up in special demurrer. Rev. Stats. Ariz. 1887, par. 734.

This complaint is not double; it sets up only one cause of action; it shows only one primary or legal right of plaintiff,—viz., the right of character (reputation or good name),—and but one violation of this right,—to wit, said malicious prosecution. Bliss on Code Pleading, secs. 453, 455, 456, 457.

And even if the complaint did set up a cause of action for malicious prosecution and one for libel, still it would not be demurrable on account of such joinder; since these torts are exactly of the same nature, admitting of the same kind of proof and relief. *Martin v. Mattison*, 8 Abb. Pr. 3; *Hill v. Vreeland*, 18 Abb. Pr. 182; *Hargon v. Purdy*, 93 Ky. 424, 20 S. W. 432.

The issuance of the warrant by a justice of the peace in the prosecution complained of constitutes no adjudication or proof of the existence of probable cause. *Sayler v. Briggs*, 4 Met. 421; *Brooks v. Bradford*, 4 Colo. App. 410, 36 Pac. 303;

Cardinal v. Smith, 109 Mass. 158, 12 Am. Rep. 582; *Burkett v. Lanata*, 15 La. Ann. 337.

The complaint states that the defendant corporation instituted the prosecution by one of its agents, thus showing how it acted. But it is always sufficient in pleading the acts of a corporation simply to allege that the corporation entered into the contract, or committed the tort, as the case may be, on the principle that "Evidence should not be pleaded." Bliss on Code Pleading, secs. 206, 207, 208, 209; *Rogers v. City*, 13 Wis. 613; *Page v. Boyd*, 11 How. Pr. 415; *Allen v. Patterson*, 3 Seld. 476.

Pleadings should state generally *what* was done. It is the province of the evidence to show *particularly how* it was done. *People v. Ryder*, 11 N. Y. 433; *Green v. Palmer*, 15 Cal. 411, 76 Am. Dec. 492.

The defendant corporation was and is capable of instituting the malicious prosecution complained of, or of doing any other tort. Rev. Stats. Ariz. 1887, pars. 232, 233; *Jordan v. Alabama etc. R. R. Co.*, 74 Ala. 85, 49 Am. Rep. 800; *Vance v. Erie Ry. Co.*, 32 N. J. L. 334, 90 Am. Dec. 665; *Goodspeed v. Bank*, 32 Conn. 530; *Roe v. Railroad Co.*, 7 Ex. 36; *Wheeler etc. Mfg. Co. v. Boyce*, 36 Kan. 350, 59 Am. Rep. 571, 13 Pac. 609.

There is a legal unity of principal and agent, as well in respect of torts as of rightful acts of the agent, done within the scope of the employment. *Railroad Co. v. Bailey*, 40 Miss. 450.

And corporations are as liable for torts so committed as an individual acting on his own account. *Baltimore etc. R. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. Rep. 719; *Jordan v. Alabama etc. R. R. Co.*, 74 Ala. 85, 49 Am. Rep. 800; *Boogher v. Life Assn.*, 75 Mo. 319, 42 Am. Rep. 413; *Iron Mt. Bank v. Merchants' Bank*, 4 Mo. App. 505.

The discharge of appellant by the justice of the peace was a sufficient termination of the prosecution to enable her to maintain this action. *Saylor v. Briggs*, 4 Met. 421; *Brooks v. Bradford*, 4 Colo. App. 410, 36 Pac. 303; *Cardinal v. Smith*, 109 Mass. 158, 12 Am. Rep. 582; *Burkett v. Lanata*, 15 La. Ann. 337; *Driggs v. Burton*, 44 Vt. 124; *Swensgaard v. David*, 33 Minn. 368, 32 N. W. 543; *Zebley v. Storrey*, 117 Pa. St. 478, 12 Atl. 569.

Even though this complaint should be demurrable as to the defendant corporation, the demurrer cannot be sustained as to both defendants. *Makepeace v. Davis*, 27 Ind. 352; *Turner v. Bank*, 26 Iowa, 562; *Webster v. Tibbits*, 19 Wis. 438; *Railroad Co. v. Schuyler*, 17 N. Y. 592; *Goncelier v. Foret*, 4 Minn. 13; *People v. City of New York*, 28 Barb. 240; *Phillips v. Hagadon*, 12 How. Pr. 17; *Christian v. Croker*, 25 Ark. 327.

C. E. Moorman, and William H. Barnes, for Appellees.

The dismissal by the justice is not such a termination of a criminal prosecution as is sufficient to establish want of probable cause. *Israel v. Brooks*, 23 Ill. 526; *Thorpe v. Balliett*, 25 Ill. 300; *Blalock v. Randall*, 76 Ill. 224.

The issuance of the warrant by the justice constitute probable cause under the Penal Code. Rev. Stats. Ariz. par. 1272, Pen. Code; *Ball v. Rawle*, 93 Cal. 222, 27 Am. St. Rep. 174, 28 Pac. 937; *Walker v. Martin*, 43 Ill. 508; *Stewart v. Sonnenbon*, 98 U. S. 119; *Hahn v. Schmidt*, 64 Cal. 284, 30 Pac. 818.

BETHUNE, J.—This is an action for damages for a malicious prosecution alleged by appellants to have been instituted by appellees against Nellie A. Sullivan, one of appellants, and the wife of appellant Patrick Sullivan. The amended complaint states: "That at Solomonville, in said county, on or about the 30th day of January, 1895, defendants made, presented, subscribed, and swore to [said corporation did so by its agents] before W. J. Parks, justice of the peace of said county, a criminal complaint in writing against plaintiff Nellie A. Sullivan, in which complaint defendants falsely, maliciously, and without any reason or cause accused her of having committed a felony." That a warrant for the arrest of said Nellie A. Sullivan was issued by said justice, upon which she was arrested by the sheriff of said county, and carried before said justice, by whom she was arraigned and examined upon said charges, and was promptly and fully discharged of and from said charge and accusations by said justice. "That said accusation, complaint, and each and every allegation thereof were and are false, malicious, and without probable cause." The complaint was demurred to on the ground that it does not state facts sufficient to constitute a

cause of action, and for duplicity and multifariousness in that it attempts to join a cause of action for malicious prosecution and an action for slander and libel. The demurrer was sustained by the court below, and judgment given for defendants.

We think the complaint contains all of the essential elements of a complaint in an action for malicious prosecution, and does not join any other cause of action therewith, and that the lower court erred in sustaining the demurrer. The judgment is reversed, and the cause remanded.

Baker, C. J., concurs.

HAWKINS, J.—I dissent. I think the demurrer should have been sustained.

[Civil No. 512. Filed July 20, 1897.]

[50 Pac. 112.]

JUAN P. CHAROULEAU, Defendant and Appellant, v.
PEDRO CHAROULEAU, Plaintiff and Appellee.

1. APPEAL AND ERROR—REVIEW—PREPONDERANCE OF THE EVIDENCE—REV. STATS. ARIZ. 1887, PAR. 834, AS AMENDED BY LAWS 1893, NO. 21, APPROVED MARCH 22, 1893.—Under the statute, *supra*, providing that “upon the general ground that the evidence does not sustain the judgment or the verdict, the court shall review the sufficiency of the evidence in the case to maintain the judgment or verdict without more particularly specified in the motion,” where all the testimony is set out in the statement of facts, this court on appeal from order overruling motion for new trial will review the evidence, and where the preponderance is decidedly against the judgment it will be reversed and a new trial ordered.

BAKER, C. J., dissenting.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. Joseph D. Bethune, Judge. Reversed.

The facts are stated in the opinion.

Rochester Ford, Silent & Campbell, for Appellant.

Barnes & Martin, for Appellee.

HAWKINS, J.—This is an action brought by the plaintiff (appellee) against the defendant to recover upon a note alleged in the complaint to have been made by the defendant to the plaintiff for the sum of seven hundred and fifty dollars on the 23d of May, 1888, payable one year after date, with interest at the rate of ten per cent per annum, which the complaint alleges to have been lost. Both complaint and answer were verified. After the evidence was concluded, the plaintiff was allowed by the court to amend his complaint by changing the amount of the note sued from \$765 to \$665, and the date thereof from May, 1888, to May, 1889; and thereafter the defendant filed his amended answer. The court on April 27, 1895, gave judgment for the plaintiff, to which the defendant excepted; and the defendant then and there moved to vacate and set aside the judgment, and to grant him a new trial, upon the general grounds,—among others, that the judgment is against the evidence and the weight of the evidence. The court on the fifteenth day of May, 1895, denied and overruled the motion, to which ruling of the court the defendant, by his counsel, then and there instantly excepted, and from the judgment and order of the court overruling the motion for a new trial the defendant has appealed.

There is only one question in this case: Is the judgment sustained by the evidence? Paragraph 834 of the Revised Statutes, as amended (Laws 1893, p. 25), is as follows:

“An act to amend paragraph 834, title XV., section 186, chapter 18, Revised Statutes of Arizona Territory, relating to new trials.

“Be it enacted . . . upon the general ground that the evidence does not sustain the judgment or the verdict the court shall review the sufficiency of the evidence in the case to maintain the judgment or verdict without more particularly specified in the motion.”

All the testimony is set out in the statement of facts, and we have complied with the above law, and are of the opinion that the preponderance of the evidence is decidedly in favor

of the defendant's plea that he had paid the note, and judgment should have been in his favor. Reversed, and new trial ordered.

ROUSE, J.—I concur in the foregoing opinion. All the evidence on the trial being preserved in the record, we are able to determine therefrom that, though the declarations in the complaint were that the suit was on a lost note, such was not the fact. The evidence shows that plaintiff and defendant are brothers, and on friendly terms; that plaintiff's wife and defendant are not friendly, and have not been friendly for many years; that defendant executed the note to plaintiff, as described; that long after the date when said note became due defendant informed a certain witness that plaintiff's wife had notified defendant that she intended to go to California, and that, if he did not pay said note, she would give him trouble; that defendant applied to said witness at the time for the loan of a certain sum of money, which defendant stated he needed to make up, with the amount he had, the sum due on said note; that said amount was loaned to defendant, as testified to by said witness, and as shown by the books of said witness, in which defendant was charged with the amount loaned to him by the witness; that said witness saw the defendant, immediately after defendant borrowed said amount of money, go to plaintiff's residence, and go into the residence; that in less than one hour thereafter defendant stated to witness that he had paid the note, and showed the note to witness, and tore the note up in witness's presence. The evidence shows that plaintiff's wife went to California about the date when defendant borrowed said sum of money from witness. The record shows that long after the date when defendant borrowed the money from witness and tore the note up in his presence defendant and other persons were at plaintiff's house to make a settlement for some cattle which had been sold, and the proceeds therefor had been collected by plaintiff; that in said settlement there was found to be due to defendant a large sum of money, which plaintiff paid over to defendant; that plaintiff's wife was present; and that some time after the money had been paid by plaintiff to defendant, and as defendant was about to leave plaintiff's house, plaintiff's wife angrily accosted defendant, and said, "When are you

going to pay that note?" to which defendant replied, "Show me a note, and I will pay it." Plaintiff's wife testified that she did not make a demand on defendant to pay the note; that she left for California the day before the date that witness saw the note in defendant's possession; that when she left home the note was in a safe, and when she returned from California it was not in the safe; that her husband could not read and could not open the safe; that she put on paper the combination of the safe, and gave it to her husband; that the safe had an inside door, which locked with a key, and that key was carried by her husband. The record shows that, once or twice during the time plaintiff's wife was in California, plaintiff had called on defendant to open the safe, and that defendant could open the safe by plaintiff handing to him the paper on which the combination was written. Plaintiff testified that he retained in his possession the key to the inside door of the safe, and unlocked that door himself. The possession of a promissory note by the maker thereof after it is due is a presumption of payment. Link that presumption with the fact that the note was in a safe securely locked with a combination lock, and with an inside door, the key to which was kept in possession of plaintiff; with the fact that plaintiff and defendant are brothers, and perfectly friendly; that long after said note was due plaintiff paid to defendant a large sum of money and did not demand the payment of said note; and, further, that plaintiff has never demanded the payment of said note, with the fact that the wife of plaintiff is not friendly with defendant, and appears to be the only person concerned in this lawsuit on the part of plaintiff,—we are forced to the conclusion that defendant paid off said note to the wife of plaintiff at the time he stated. The allegations in the complaint are upon a lost note. The record does not support those allegations. In fact, plaintiff does not pretend to rely on that theory, but on the theory that said note was stolen by defendant. To sustain the judgment we would have to find from the evidence in the record that defendant was guilty of a felony,—that he did steal said note. We are convinced by the evidence in the case that defendant did pay off said note to the wife of plaintiff at the time he stated, and that the judgment should have been for the defendant.

BAKER, C. J. (dissenting).—I dislike to differ from my associates upon so simple a case as the one in hand, but am impelled to do so out of regard for the well-established rule that the appellate court will not disturb the verdict or judgment of the lower court where there is a substantial conflict in the testimony upon a material point. The action is upon a promissory note, and the defense is payment. The evidence sharply conflicts upon this single issue, as will be seen in the recitation of facts by Justice Rouse. The appellant's counsel, in his brief, says that the testimony is "wholly irreconcilable." No more and no less can be said. The trial court, in the presence of the witnesses, decided this issue against payment, and, I think, upon evidence amply sufficient to sustain the finding. We are not authorized to decide cases in this court upon the mere weight or preponderance of the evidence. The statute quoted by Justice Hawkins authorizes this court to "review the evidence," but this review is at an end where a material conflict in the evidence appears, or when it appears that the evidence is sufficient to support the finding. The fact that the complaint proceeds upon the idea that the note was lost is of no consequence. Its execution and delivery were admitted, and the sole defense of "payment" was made. No objections were made to the testimony, and no variance suggested. I think the reversal is wholly unwarranted.

[Civil No. 507. Filed July 20, 1897.]

[50 Pac. 113.]

MICHAEL J. SULLIVAN, Defendant and Appellant, v.
WILLIAM P. WOODS et al., Plaintiffs and Appellees.

1. FORCIBLE ENTRY AND DETAINER—ISSUES—RIGHT OF POSSESSION—PLEA TO JURISDICTION—TITLE INVOLVED.—Under an action for forcible entry and detainer, the only issue is right of possession, and it is not error for the justice of the peace to overrule a plea that the court had no jurisdiction of the case for the reason that the title to the property was involved.
2. MORTGAGES—DEED ABSOLUTE—SATISFACTION OF PRIOR MORTGAGE DEBTS—CONTEMPORANEOUS AGREEMENT TO RECONVEY—OPTION TO PURCHASE—EVIDENCE.—Where defendant, a mortgagor, in satis-

faction of his mortgage debt, gave a deed absolute to his mortgagees of the mortgaged property, and took at the same time an agreement wherein the mortgagees bound themselves to allow him to repurchase within six months for the amount of the indebtedness and to reconvey, he to have the use of the premises in the mean time upon payment of fifteen dollars a month as interest, and the evidence shows that at the time the deed was made the note was surrendered and the mortgage cancelled, such agreement is simply an option to purchase, the intention of all parties as shown by the transfer being to save the expense of foreclosure.

3. MORTGAGE—ACTION TO DECLARE DEED ABSOLUTE MORTGAGE—EVIDENCE—PREPONDERANCE INSUFFICIENT.—A mere preponderance in the evidence is insufficient to prove a deed absolute on its face a mortgage. It must be shown that it was executed, delivered, accepted, and intended as a mortgage by clear and certain and conclusive evidence.
4. COURTS — JURISDICTION — JUDGMENTS — APPEAL — POWER TO ALTER AFTER APPEAL DURING TERM.—A district court has power, after notice of appeal has been given and bond on appeal filed, at any time during the term at which a judgment has been entered, to set aside such judgment and enter such other judgment as is warranted by the law and the evidence.

BAKER, C. J., dissenting.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. Joseph D. Bethune, Judge. Affirmed.

Statement of facts:—

This was an action of forcible entry and detainer, commenced before the justice of the peace of Tucson Precinct, appealed to the district court. On the 17th of August, 1894, Sullivan was indebted to the appellees in the sum of \$1,361. To evidence and secure this debt, appellees had the promissory note of appellant and a mortgage on the real estate in controversy. On said day, the debt being due and unpaid, payment was demanded, and appellant gave a deed, absolute in its terms, to appellees, wherein he conveyed said real property to them. At the same time appellees gave appellant back an agreement, which is as follows: "Whereas, by deed bearing date the seventeenth day of August, 1894, Michael J. Sullivan sold and conveyed to William P. Woods and Reuben M. Aldridge those certain lots, numbered six (6), seven (7), ten (10), and eleven (11), in block numbered ninety-four (94), in

the city of Tucson, according to the official map and survey of said city made and executed by S. W. Foreman, and approved by the mayor and common council of the said city of Tucson, then village of Tucson, June 26th, 1872, for value received it is hereby agreed by the said William P. Woods and Reuben M. Aldridge that the said Michael J. Sullivan has the right at any time within six months from the date hereof, upon the payment to the said William P. Woods and Reuben M. Aldridge of the sum of one thousand three hundred and sixty-one dollars lawful money of the United States, to repurchase the said described property, and the said William P. Woods and Reuben M. Aldridge hereby agree, upon the payment by the said Michael J. Sullivan, his heirs or assigns, to them, of the said sum of one thousand three hundred and sixty-one dollars lawful money of the United States, within six months from the date hereof, to reconvey by quitclaim deed the said described property to the said Michael J. Sullivan, his heirs or assigns. Michael J. Sullivan is to have the use of the said-described property, and is entitled to the rents, issues, and profits thereof, subject to the monthly payment of fifteen dollars per month as interest, the said monthly payment of fifteen dollars per month to be paid on the seventeenth day of each month for the term of six months from the date hereof; and, should the said monthly payment of fifteen dollars per month, as aforesaid, remain due and unpaid at any time for sixty days, then, and in that event, this agreement and all previous payments made thereunder shall thereby become and be forfeited, and the said Michael J. Sullivan shall vacate the premises herein described, and render peaceable possession of the same to the said William P. Woods and Reuben M. Aldridge, and surrender this agreement." At the time of making said deed and agreement appellees returned the note to appellant, and released the mortgage. Complaint in unlawful detainer was filed with the justice of the peace on the first day of March, A. D. 1895, alleging an oral lease was entered into on said 17th of August, 1894, whereby appellant leased of appellees for six months said real property at the rental of fifteen dollars per month, payable in advance; that by virtue of such lease appellant went into possession of said property, but, the lease having expired, appellees were entitled to the possession; that the rent due on the seventeenth day of February, 1895, was unpaid, and is due. Therefore,

appellees demand possession of the premises, and a judgment for fifteen dollars. To this complaint appellant filed a general denial.

It appears in the record that appellant pleaded also that the justice court in which the suit was brought had no jurisdiction of the case, for the reason that the question of the title to said real property would be a question in the case; and in support of such plea the agreement above stated was filed in the case. This plea was overruled by the justice, the case was tried, and judgment entered for appellees. The case was appealed, then, to the district court. The district court tried the case, and at the trial found that the deed and agreement were contemporaneous, and, taken together, constituted a mortgage, and ordered judgment in favor of the appellant. A motion for a new trial was overruled by the court. Appellees gave notice of appeal to this court, and filed their appeal bond. The bond was approved by the clerk of the district court. On the 28th of June, 1895, the day before the district court finally adjourned for the term, said district court, on its own motion, vacated the judgment rendered for appellant, and rendered judgment in favor of appellees for possession of the premises, and gave judgment for the sum of fifteen dollars and costs. To this latter judgment appellant excepted, filed his motion to set it aside, which was overruled, and appeal was taken to this court.

C. W. Wright, for Appellant.

Thomas F. Wilson, Barnes & Martin, and Calvert Wilson,
for Appellees.

HAWKINS, J. (after stating the facts).—The appellant, in the trial of the cause, claimed that the agreement above stated was a defeasance, which changed the deed absolute, executed by defendant to plaintiffs, to a mortgage. Under the complaint and answer filed in the justice court the title to the real property was not in question. The only issue to be tried was the right of possession, and the justice correctly overruled the motion. The defendant did not sign the written agreement. It is by its terms simply an option permitting defendant to repurchase the property within six months from its date. In order for the deed, absolute on its face, with the

written instruments, to become a mortgage, they must show, when construed together, that the intention of the parties to both was to secure a debt. Jones on Mortgages, sec. 16, and cases there cited. It would hardly be seriously contended that appellees could have sued appellant for \$1,361, and recovered judgment against him for such sum as a debt, for the reason that when he gave the deed the evidence of the debt was surrendered, and the mortgage canceled, and the instruments, construed together, show clearly that it was the intention of all the parties to save the expense of a foreclosure. The appellant pleaded the general issue, and introduced the said agreement, and contended, as stated, that these two instruments constituted a mortgage. Proof of all parties, both plaintiffs and defendant, was heard by the court. When there is a substantial conflict in the evidence, a mere preponderance of evidence is insufficient to prove that an absolute deed was a mortgage. It must be shown that it was executed, delivered, and accepted and intended as a mortgage by clear and certain and conclusive evidence. *Perot v. Cooper*, 17 Colo. 80, 31 Am. St. Rep. 258, 28 Pac. 391. "When the written papers do not show that security was meant, it is incumbent upon the party seeking to establish a mortgage to show that a mortgage was intended." *Gassert v. Bogk*, 7 Mont. 585, 19 Pac. 281. "For a deed, absolute on its face, to be declared a mortgage, the testimony must establish a clear case." *Ganceart v. Henry*, 98 Cal. 281, 33 Pac. 92; *Henley v. Hotelling*, 41 Cal. 22; *Hanford v. Blessing*, 80 Ill. 188. "A deed absolute on its face, given by A to B for real estate therein described, and a bond given by B to A agreeing to convey to A a portion of the same property at a stipulated time, although given on the same date, and for the same price, if not intended to be a mortgage, or security for money, by the parties themselves, and not appearing to be such on the face of the instruments, held to be an absolute bargain and sale, and not a mortgage." *Winters v. Swift*, 2 Idaho, 61, 3 Pac. 15. "To justify a court of equity in holding a deed absolute on its face to have been intended by its parties as a mortgage simply, the proof should be clear and satisfactory." *Albany Canal Co. v. Crawford*, 11 Or. 243, 4 Pac. 113. "One who, in the absence of fraud or false representations, has executed to a creditor a deed to certain property, and retained possession under a lease, the deed and lease

providing that the premises should be reconveyed to the tenant upon his payment of the rent and the debt which these instruments were given to secure, is estopped to deny such landlord's title in an action brought to recover the rent." *Knowles v. Murphy*, 107 Cal. 107, 40 Pac. 111.

The appellant also contends that the court below had no power to set aside the judgment for defendant, and give judgment for plaintiffs, after notice of appeal and bond had been filed. It might probably have been better practice for the court below to have vacated its order denying appellees' motion for a new trial, and to have granted the same. The court, however, retained power over the judgment during the term, and the order which it did make was made during the term; and in the term it has the right to amend, set aside, or annul all orders and decrees made in the case. This is an inherent power in the court, and cannot be abridged or lost by the act of either party in taking steps necessary to perfect an appeal. There is nothing to appeal from until the judgment and decrees of the court are irrevocable by the court which pronounced them. The judgment in the court below in this case was not irrevocable by that court until the close of the term in which the judgment was entered. *Manchester v. Herrington*, 10 N. Y. 164; *Chiniquy v. People*, 78 Ill. 570; 12 Am. & Eng. Ency. of Law, p. 90, and cases cited; *Barrell v. Tilton*, 119 U. S. 637, 7 Sup. Ct. Rep. 332; 25 Am. & Eng. Ency. of Law, p. 120, and cases cited. An examination of the evidence in the case shows us that the judgment of the lower court is fully sustained.

The only question under the pleadings was the right of possession. There is no evidence that a full and ample consideration was not paid by appellees to appellant for the property. There is no allegation of fraud or false pretense on the part of the appellees in the transaction. The appellant appears to have received full consideration for the premises, and he did not pay the amount stipulated for the use of the premises. The fact that the agreement says that the said appellant is to have the use of the property subject to a monthly payment of fifteen dollars per month as interest, when construed with the deed and instrument, does not make any difference. It was clearly the intent of the parties that it should be for the use of these premises. The appellant has

not undertaken to pay the amount of \$1,361, nor does he offer to do so. We see no substantial error in the record, and the judgment is therefore affirmed.

Rouse, J., concurs.

BAKER, C. J.—I dissent. The record shows that the appellant recovered judgment against the appellees in the suit on May 3, 1895, to the effect that the agreement was in writing, and that the same constituted a mortgage, and that suit was prematurely brought, and that the appellees take nothing by their action; that on May 4, 1895, the appellees made their motion for a new trial, which motion was argued, and overruled by the court on May 15, 1895; that on May 23d the appellees gave notice in open court of an appeal to this court, and on May 24, 1895, filed their bond on appeal, which bond was duly approved and accepted; that upon May 28th the court, upon its own motion, set aside and vacated the judgment so appealed from, and rendered another judgment in the suit for the appellees and against the appellant to the effect that the appellees recover possession of the premises, etc. The court finally adjourned thereafter. The court plainly erred in vacating the first judgment. The effect of the appeal was to invest this court with all jurisdiction over the cause, and deprive the district court of any jurisdiction thereover. This is a well-established rule, and is directly recognized by our statute. "When the bond or affidavit in lieu thereof provided in the preceding sections, has been filed and the previous requirements of this act have been complied with, the appeal or writ of error, as the case may be, shall be held to be perfected." Rev. Stats. Ariz., par. 861. "Upon the filing of the bonds mentioned in the two preceding sections the appeal or writ of error shall be held to be perfected, and the execution of the judgment shall be stayed, and should execution have been issued thereon, the clerk shall forthwith issue a *superseas*." Rev. Stats. Ariz., par. 865. The following authorities abundantly sustain this view: 1 Black on Judgments, sec. 243; 2 Hayne on New Trial and Appeal, par. 224; 2 Ency. Pl. & Prac. 327; *Keyser v. Farr*, 105 U. S. 265; *Boynton v. Foster*, 7 Met. (Mass.) 415; *Ladd v. Couzins*, 35 Mo. 513; *Burgess v. Donoghue*, 90 Mo. 299, 2 S. W. 303; *Allen v. Allen*, 80 Ala. 155; *Bryan v. Berry*, 8 Cal. 130; *Kimberly v. Arms*, 40 Fed.

548; *Chestnutt v. Pollard*, 77 Tex. 86, 13 S. W. 852. Upon an examination of the authorities cited in the main opinion, it will be found that none of them sustain that opinion upon this point. The question is not even involved in them, and I can only account for their use as being an unintentional misquotation.

MEMORANDUM DECISIONS.

[Civil No. 556.]

In the Matter of the Final Account of THOMAS HUGHES,
Special Administrator of Joseph Purr, Deceased.

APPEAL from the District Court of the First Judicial
District in and for the County of Pima. J. D. Bethune,
Judge.

No appearance for Appellant.

Rochester Ford, for Appellees.

January 15, 1897. Affirmed.

[Civil No. 533.]

OSCAR BUCKALEU, Appellant, v. LEO GOLDSCHMIDT,
Appellee.

APPEAL from the District Court of the First Judicial
District in and for the County of Pima. J. D. Bethune,
Judge.

Barnes & Martin, for Appellant.

S. M. Franklin, for Appellee.

January 15, 1897. Affirmed.

[Civil No. 558.]

JENNIE M. CROW et al., Appellants, v. ELLA C. ADAMS,
Appellee.

APPEAL from the District Court of the Third Judicial
District in and for the County of Maricopa. A. C. Baker,
Judge.

No appearance for Appellants.

Millay & Bennett, for Appellee.

January 15, 1897. Affirmed.

[Civil No. 559.]

JENNIE M. CROW et al., Appellants, v. R. W. SMALL,
Appellee.

APPEAL from the District Court of the Third Judicial
District in and for the County of Maricopa. A. C. Baker,
Judge.

No appearance for Appellants.

Millay & Bennett, for Appellee.

January 15, 1897. Affirmed.

[Civil No. 566.]

J. DE BARTH SHORB, Appellant, v. GEORGE W. HOAD-
LEY, Administrator of the Estate of Robert Garside,
Deceased, Appellee.

APPEAL from the District Court of the Third Judicial
District in and for the County of Maricopa. A. C. Baker,
Judge.

No appearance for Appellant.

Thomas Armstrong, Jr., for Appellee.

January 15, 1897. Affirmed.

[Civil No. 560.]

JENNIE M. CROW et al., Appellants, v. ANNA HOREN,
Appellee.

APPEAL from the District Court of the Third Judicial
District in and for the County of Maricopa. A. C. Baker,
Judge.

No appearance for Appellants.

Millay & Bennett, for Appellee.

January 15, 1897. Affirmed.

[Civil No. 522.]

SEIGLE BECKNER, Appellant, v. WALTER SCOTT, Appellee.

APPEAL from the District Court of the Fourth Judicial District in and for the County of Mohave. John J. Hawkins, Judge.

Dismissed with costs, on authority of counsel for Appellant. L. Ed. 43:1180.

Breeze & Burris, and Herndon & Norris, for Appellant.

R. E. Sloan, for Appellee.

January 30, 1897. Affirmed.

[Civil No. 495.]

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation, Appellant, v. EDWARD ARHELGER, Administrator of the Estate of Alexander Graydon, Deceased, Appellee.

APPEAL from the District Court of the Second Judicial District in and for the County of Gila. Owen T. Rouse, Judge.

J. B. Early, for Appellant.

E. J. Edwards, for Appellee.

January 30, 1897. Reversed.

[Civil No. 501.]

THE SANTA FE, PRESCOTT AND PHOENIX RAILWAY COMPANY, Appellant, v. JOSEPH HURLEY, Appellee.

APPEAL from the District Court of the Fourth Judicial District in and for the County of Yavapai. J. D. Bethune, Judge.

Judgment affirmed, with costs and interest, by divided court. 43 L. Ed. 1183.

Johnston & Sloan, L. H. Chalmers, Associate Counsel, for Appellant.

J. F. Wilson, and Herndon & Norris, for Appellee.

January 30, 1897. Affirmed.

[Criminal No. 116.]

AUGUSTIN CHALON, Appellant, v. THE TERRITORY
OF ARIZONA, Respondent.

APPEAL from the District Court of the Second Judicial District in and for the County of Graham. O. T. Rouse, Judge.

William M. Lovell, J. M. McCullum, and R. S. Patterson, for Appellant.

J. F. Wilson, Attorney-General, Wiley E. Jones, and William H. Barnes (of Counsel), for Respondent.

February 23, 1897. Affirmed.

[Criminal No. 117.]

NICHOLAS MITHEIAS, Respondent, v. THE TERRITORY
OF ARIZONA, Appellant.

APPEAL from the District Court of the Second Judicial District in and for the County of Pinal. O. T. Rouse, Judge.

J. F. Wilson, Attorney-General, and F. M. Doan, District Attorney, for Appellant.

John S. Sniffen, for Respondent.

February 23, 1897. Affirmed.

[Criminal No. 119.]

JOHN S. JONES, Appellant, v. THE TERRITORY OF
ARIZONA, Respondent.

APPEAL from the District Court of the Fourth Judicial
District in and for the County of Yavapai. J. J. Hawkins,
Judge.

T. W. Johnson, for Appellant.

R. E. Morrison, District Attorney, for Respondent.

February 23, 1897. Affirmed.

(NOTE BY REPORTER.—Record shows "Opinion filed March 6, 1897,"
but none appears in the records of the office of the clerk of the supreme
court.)

[Civil No. 523.]

THE BANK OF ARIZONA, Appellant, v. WILLIAM LAR-
KIN, Appellee.

APPEAL from the District Court of the Fourth Judicial
District in and for the County of Yavapai. A. C. Baker,
Judge.

Herndon & Norris, for Appellant.

J. H. Wright, for Appellee.

February 23, 1897. Affirmed.

[Civil No. 534.]

FRANK LOHMAN, Appellant, v. LEW WILLARD, Ap-
pellee.

APPEAL from the District Court of the Fourth Judicial
District in and for the County of Yavapai. John J. Haw-
kins, Judge.

R. E. Sloan, R. E. Morrison, and T. W. Johnson, for Ap-
pellant.

Herndon & Norris, for Appellee.

February 23, 1897. Affirmed.

[Civil No. 535.]

WILDMAN-PETERS-GOLDMAN COMPANY et al., Appellants, v. SUSAN SHANNON, Appellee.

APPEAL from the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge.

W. J. Kingsbury, for Appellants.

J. B. Early, for Appellee.

February 23, 1897. Affirmed.

[Civil No. 536.]

THE ARIZONA NORTHERN MINING COMPANY, Plaintiff in Error, v. ED. CAIN, Defendant in Error.

ERROR to the District Court of the Fourth Judicial District in and for the County of Mohave. John J. Hawkins, Judge.

E. M. Sanford, and R. J. Baldwin, for Plaintiff in Error.

Herndon & Norris, and J. M. Murphy, for Defendant in Error.

February 23, 1897. Affirmed.

[Civil No. 537.]

CHESS SMITH, Appellant, v. W. D. JEFFERSON, Appellee.

APPEAL from the District Court of the Second Judicial District in and for the County of Graham. Owen T. Rouse, Judge.

William H. Barnes, and John McGowan, for Appellant.

Wiley E. Jones, for Appellee.

February 23, 1897. Reversed.

[Civil No. 539.]

HENRIETTA MINING AND MILLING COMPANY,
Plaintiff in Error, v. **J. F. GARDNER,** Defendant in
Error.

ERROR to the District Court of the Fourth Judicial District in and for the County of Yavapai. J. D. Bethune, Judge.

Reversed. 173 U. S. 123, 43 L. Ed. 637, 19 Sup. Ct. 327.

J. F. Wilson, for Plaintiff in Error.

Robert E. Morrison, and Herndon & Norris, for Defendant in Error.

February 23, 1897. Affirmed.

[Civil No. 548.]

NORTON MARSHALL, Appellant, v. **PETER T. BURTIS,**
Appellee.

APPEAL from the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge.

Affirmed. 172 U. S. 630, 43 L. Ed. 579, 19 Sup. Ct. 290.

Thomas Armstrong, Jr., and W. H. Stilwell, for Appellant.

Fitch & Campbell, for Appellee.

February 23, 1897. Affirmed.

[Civil No. 550.]

AL GRADY, Plaintiff in Error, v. **T. F. McMILLON et al.,**
Defendants in Error.

ERROR to the District Court of the Fourth Judicial District in and for the County of Coconino. J. J. Hawkins, Judge.

E. M. Sanford, J. W. Ross, and H. D. Ross, for Plaintiff in Error.

E. S. Gosney, and Oscar Gibson, for Defendants in Error.
February 23, 1897. Affirmed.

[Civil No. 551.]

J. F. MEADOR, Appellant, v. ZENOS CO-OPERATIVE
MERCANTILE AND MANUFACTURING INSTI-
TUTE, a Corporation, Appellee.

APPEAL from the District Court of the Third Judicial
District in and for the County of Maricopa. A. C. Baker,
Judge.

W. H. Stilwell, for Appellants.

Morton & Sherman, Damron & Crenshaw, for Appellee.

February 23, 1897. Affirmed.

[Civil No. 552.]

JAMES T. SIMMS, Appellant, v. HANNAH T. SIMMS,
Appellee.

APPEAL from the District Court of the Third Judicial
District in and for the County of Maricopa. John J. Hawkins,
Judge.

Modified and affirmed. 175 U. S. 162, 44 L. Ed. 115, 20
Sup. Ct. 58.

Pierce Evans, C. F. Ainsworth, and Fitch & Campbell, for
Appellant.

Millay & Bennett, Joseph H. Kibbey, and W. H. Barnes, for
Appellee.

February 23, 1897. Affirmed.

ROUSE, J., dissenting.—I am not able to agree with the
majority of the court in the judgment announced, affirming
the judgment of the district court.

The appellant, James T. Simms, as plaintiff in the district
court, commenced an action for a divorce against his wife,
Hannah T. Simms, on the ground of abandonment. In her
answer, after the general denial, she set up a cross-bill pray-
ing for a divorce from plaintiff on the ground of cruelty.

Subsequently she dismissed her cross-bill and the trial was had on the complaint and the general denial thereto. The record shows that plaintiff and defendant had been married for several years; that when they were married plaintiff was a widower, and had several sons by a former marriage; that plaintiff and defendant for several years resided on a farm near Phoenix, on which there was a comfortable residence, in which they had resided for some time; that a few years before the suit for divorce was commenced plaintiff and defendant had left their said home and had gone to an eastern state to reside, the said farm being leased or rented to plaintiff's sons, who were then men of full age, and that they occupied the dwelling referred to and cultivated the farm connected therewith; that subsequently plaintiff and defendant returned to the territory and again took up their residence in said dwelling. There is evidence in the record to show that defendant and plaintiff's sons did not get along amiably. The complaint was filed October 9, 1894, and the answer thereto was filed on October 18, 1894.

Some time in October, 1893, the record discloses the fact that defendant and one of plaintiff's sons, who also resided in the same dwelling, not being able to get along, plaintiff made something of a proposal to defendant, that plaintiff and defendant would leave the farm and go to the Lemon Hotel, in Phoenix, to live, to which defendant in part consented; that thereafter plaintiff, on the fourteenth day of December, 1893, secured rooms at said hotel, and notified defendant of that fact, and requested her to go there with him and live. This she declined to do, and though often requested by said plaintiff to go to said hotel and live, she refused, and as a result this suit of divorce was commenced on the ground of abandonment. The court refused to grant plaintiff a divorce. We are not inclined to differ with the court in its judgment affirming that decision, notwithstanding our belief that plaintiff was sincere in establishing a home at the Lemon Hotel, where he and defendant could reside in peace, while the sons could reside where they were residing. We believe the plaintiff's purpose was to promote the happiness of the wife and also the happiness of the sons. We are further inclined to believe from the record that defendant believed plaintiff's location at the said hotel was sincere and

in good faith, but for purposes not now necessary to express she declined to go there to live with plaintiff.

The statute of this territory provides that a divorce may be granted to a husband "when his wife shall voluntarily have left his bed and board for the space of six months with the intention of abandonment." Rev. Stats. 1887, par. 2111, subd. 2. This action at bar was for a divorce on the ground set forth in this statute. Hence, while the husband had the right to fix the domicile, and his domicile is the wife's domicile, and she must reside there with him, yet as by the terms of the said statute the abandonment of the wife is established by certain acts on her part, the acts of the husband in choosing a domicile and the action of the wife in refusing to live with him are facts necessary to be considered by the trial courts, and if that court, by the exercise of a sound discretion, should find that the acts of the husband in the selection of a home were not exercised in good faith for the best interests of himself and family, the court should refuse to grant him a divorce. If, upon the other hand, the court should believe the home was thus chosen, and the wife should decline to go there to reside with him without a proper reason, the divorce should be granted. On June 6, 1896, the court gave judgment dismissing plaintiff's bill for divorce and entered a judgment for the defendant that she have judgment for seven hundred and fifty dollars for counsel fees, and one hundred and fifty dollars per month for her maintenance since the fourteenth day of December, 1893.

To the judgment of this court affirming the said judgment of the district court, allowing said sum for counsel fees and the allowance to defendant of one hundred and fifty dollars per month from December 14, 1893, as alimony, I dissent. It appears from the record that the defendant has no children or any one dependent upon her for support; that long before there was any move on the part of plaintiff toward an effort to secure a divorce a division of plaintiff's property was made with defendant, so that, by good and sufficient instruments, what was considered by both parties to be one half of all the possessions was transferred to her. By said transaction defendant received real estate from plaintiff proven in this trial to be worth at the date of the trial something over forty thousand dollars. That said property was her separate prop-

erty, and under her control from the date when so conveyed to her and from that time to the date of the trial. Said division of the property was made with the express purpose of disposing of the community property, and to make full preparations for the preservation of the wife's rights. The statute of this territory provides: "If the wife, whether complainant or defendant, has not a sufficient income for her maintenance during the pending of a suit for a divorce, the judge may, either in the term time or in vacation, after due notice, allow her a sum for her support in proportion to the means of the husband, until a final decree shall be made in the case." Rev. Stats. 1887, par. 2120.

That statute gives the judge or court pending the action certain power. This power of the judge or court depends, first, upon the fact that the wife has not a sufficient maintenance; second, after due notice has been given; third, the allowance must be in proportion to the husband's means; fourth, the allowance can only be until the suit is terminated. The complaint in the case at bar was filed October 9th, and the answer thereto October 18, 1894. No motion for alimony was made by defendant until April 2, 1896, nearly eighteen months after issue was joined. On that date her motion was made, and notice served on plaintiff, and counter-affidavits were filed, but no order was made with reference thereto, and nothing done thereon, until the date of the final judgment, June 6, 1896, and then only in the final judgment. The power to grant alimony is pending the action for divorce, not at the time when divorce is refused and case is dismissed. It is an allowance for the wife's support and to provide her with the means to prosecute the action or make her defense. Rev. Stats. 1887, par. 2120. She had maintained herself, and had been represented by a number of distinguished attorneys from the beginning. The suit was at an end when the judgment for an allowance was made. Again, the record shows that the defendant owned property in her own right acquired from plaintiff of equal value to that which he owned,—of the value of over forty thousand dollars,—which was productive. Before alimony can be allowed, it must be shown that the wife has not sufficient income for her maintenance pending the action. Par. 2120, *supra*; Bishop on Marriage and Divorce, sec. 394; *Collins v. Collins*, 80 N. Y. 12.

The judgment in this case for alimony was at the time the divorce was refused; it was not pending the action.

The judgment was a money judgment in favor of the wife, to be enforced against her husband by an execution, notwithstanding the fact that she was possessed of large means and was robbed during the pendency of the suit with the marital right to draw on her husband's credit for support, and notwithstanding the fact that she may have needed a maintenance in that way during that time. The allowance was one hundred and fifty dollars per month for a period from December, 1893, up to the date of the judgment, covering a period of nearly a year before the suit was filed, covering a period when only the threatenings of a domestic storm were approaching, but when no storm was actually raging. The judgment for alimony was for a sum over five thousand dollars, of which said seven hundred and fifty dollars was for counsel fees. The statute only authorizes the court to make an allowance to the wife for her maintenance during the pendency of the suit; the allowance cannot be made after the suit is terminated.

The allowance can only be on motion made after notice, not before, and certain conditions must be known to exist before the order can be made. In this case the motion was made and notice given, but no order was made. The action is for a divorce, and not an action for the division of the property between plaintiff and defendant, or for a personal judgment between them; the divorce being refused, the parties remained husband and wife, with all the rights of such, and governed by all the laws pertaining to the marital relation. The only judgment there could be pronounced in this case, on the refusal of the divorce, was a judgment for costs. If the court had prior to that time made an order allowing the wife support, etc., and said order had not been complied with, it would have had power to enforce said order; but it had no power to enter the judgment for allowance which was entered. That judgment, as has been stated, reaches back to a time when there were no domestic troubles, and in effect regulates the domestic affairs of the parties at a time when they were not before the court. By statute it is provided: "The court pronouncing a decree of divorce from the bonds of matrimony shall also decree and order a division of the estate of the

parties in such a way as to the court shall seem just and right, having due regard to the rights of each party and their children, if any; provided, however, that nothing herein contained shall be construed to compel either party to divest him or herself of the title to separate property." Rev. Stats. 1887, par. 2114. If a divorce had been granted in the case at bar, the court could have divided the community property between the parties as would have been just and right, but could not have interfered with their separate property. It is further provided: "The court may award costs to party in whose behalf the sentence or decree shall pass, or that each party shall pay his or her own costs as to the court shall appear reasonable." Rev. Stats. 1887, par. 2122. There are no other provisions of the statutes applicable to the case at bar, and hence we hold that the only judgment that the court could render was judgment for the costs of the suit. The judgment was entered in this case, on the thirteenth day of June, 1896, for the sum of five thousand two hundred and fifty dollars, exclusive of costs, and the motion for a new trial and to set aside such judgment was overruled and denied on June 29, 1896. Thereafter, on June 30, 1896, plaintiff filed an appeal-bond in the sum of eleven thousand dollars, which was duly approved and appeal granted. Thereafter, on the fifteenth day of July, 1896, defendant gave notice to plaintiff that on July 27, 1897, she would apply for an order for alimony pending the appeal of said case, and on said date last mentioned the judge made a decree ordering and adjudging that plaintiff pay defendant within ten days two hundred and fifty dollars for her support, as alimony at the rate of one hundred and fifty dollars per month from the date of said former decree,—viz., June 13, 1896,—and the further sum thereafter of one hundred and fifty dollars per month in advance from the first day of August, 1896, during the pendency of the action, and the further sum of five hundred dollars as counsel fees. Thereafter, in the supreme court, the appellee, defendant below, on the twenty-seventh day of January, 1897, filed in the supreme court her motion for an order dismissing said appeal for the reason that appellant had not complied with the decree and order last above referred to, and on the same date—viz., January 27, 1897—her attorneys, Messrs. Kibbey, Barnes, Millay, and Bennett, filed a motion to remit

all the judgment of the district court for alimony and attorneys' fees in excess of five thousand dollars,—to wit, the sum of two hundred and fifty dollars. It will be observed that at the date of judgment the amount decreed in favor of defendant was two thousand five hundred and fifty dollars; that plaintiff perfected his appeal on June 30, 1897, and that thereafter the court decreed that plaintiff should pay defendant one hundred and fifty dollars per month; that two hundred and fifty dollars was due to August 1, 1896; that in addition thereto he was to pay her five hundred dollars for counsel fees. Due at the date of said motion,—viz., January 27, 1897: Original judgment, \$5,250; alimony to August 1, 1896, \$250; alimony per month thereafter, to February 1, 1897, \$900; counsel fees, \$500;—making in all, \$6,900. The bond on appeal was both an appeal and a stay bond. After it was executed, approved, and filed, the appeal was complete, and the district court no longer had jurisdiction over the case. Rev. Stats. 1887, par. 865. The case then was under the jurisdiction of the supreme court on appeal, and said court had jurisdiction of the case, as it was on the final date when judgment was entered by the district court.

“Any party in whose favor a verdict or judgment has been rendered may in open court remit any part of said verdict or judgment, and such remitter shall be noted in the docket and entered in the minutes, and an execution shall thereafter issue for the balance only of such judgment after deducting the amount remitted.” Rev. Stats. 1887, par. 817.

It is evident from said paragraph and the remaining paragraphs of the chapter of the statutes to which it belongs that the remitter can only be entered in the district court, and only in that court before an appeal has been perfected, excepting as is provided by the following: “If in any judgment rendered in the district court there shall be an excess of damages rendered, and before the plaintiff has entered a release of the same in such court in the manner provided by law, such judgment shall be removed to the supreme court; it shall be lawful for the party in whose favor such excess of damages has been rendered to make such release in the supreme court, in the same manner as such release is required to be made in the district court.”

The course to be pursued in entering a remitter not in

term is pointed out and directed by paragraph 818 of the Revised Statutes of 1887. That course was not pursued in this case; and even if the case at bar was such as that in which a remitter could be entered, the appellee failed to pursue the course prescribed by law, and the judgment has to remain where it was—entered in the district court. It will be observed, however, that the right to remit is given only to a plaintiff. It is evident that the right is given to the one who has instituted a suit to recover a money judgment or a property of a certain value, that he may make a verdict or judgment which is in excess of the amount claimed a valid verdict or judgment, by having them correspond with the allegations of the complaint, or to correspond to the evidence in the trial. In the case at bar the judgment was for five thousand two hundred and fifty dollars. To secure an appeal and stay of judgment, plaintiff was required by law to execute a bond for at least double the sum. A bond in a smaller sum would not have stayed the execution. The right of appeal from the district to the supreme court is fixed on the value of the matter in controversy, at two hundred dollars. Suppose the judgment of the district court exceeds that sum, and an appeal is taken: can it be successfully maintained that after the appeal has been perfected the appellee can destroy the jurisdiction of the supreme court by entering a remitter so as to bring the amount just under two hundred dollars? Again, suppose a suit should be instituted in a court for a sum in excess of jurisdiction of said court: could jurisdiction be retained by the plaintiff, after judgment, remitting all in excess of jurisdictional sum? We contend that a remitter can only be made to correct an error in the verdict or judgment by reason of the fact that the verdict or judgment is in excess of the amount claimed, or that the evidence does not support the verdict or judgment. It is apparent that in the effort to remit the insignificant sum of two hundred and fifty dollars that it was the purpose of appellee to prevent the case from going to another tribunal for review, leaving the judgment reduced to just five thousand dollars. As stated before, this is not an action for a money judgment. The money part of the judgment is a mere incident. It was rendered, in our judgment, without any legal authority. Hence we think the judgment should be reversed and the case dismissed.

[Civil No. 554.]

THE LOTTIE MINING COMPANY, Plaintiff in Error, v.
GEORGE WHITAKER, Defendant in Error.

ERROR to the District Court of the Fourth Judicial District in and for the County of Yavapai. John J. Hawkins, Judge.

E. M. Sanford, for Plaintiff in Error.

Herndon & Norris, for Defendant in Error.

February 23, 1897. Affirmed.

[Criminal No. 118.]

HARRY MURPHY et al., Appellants, v. THE TERRITORY
OF ARIZONA, Respondent.

APPEAL from the District Court of the First Judicial District in and for the County of Pima. J. D. Bethune, Judge.

Charles Blenman, for Appellants.

J. F. Wilson, Attorney-General, for Respondent.

February 24, 1897. Affirmed.

[Criminal No. 115.]

JOHN RODGERS, Appellant, v. THE TERRITORY OF
ARIZONA, Respondent.

APPEAL from the District Court of the First Judicial District in and for the County of Pima. O. T. Rouse, Judge.

Rochester Ford, and Charles Blenman, for Appellant.

J. F. Wilson, Attorney-General, and William M. Lovell, for Respondent.

February 24, 1897. Affirmed.

[Criminal No. 120.]

PHILIP LASHLEY, Appellant, v. THE UNITED STATES OF AMERICA, Respondent.

APPEAL from the District Court of the First Judicial District in and for the County of Pima. J. D. Bethune, Judge.

Charles Blenman, for Appellant.

Alfred Franklin, Assistant United States Attorney, for Respondent.

February 24, 1897. Affirmed.

[Criminal No. 121.]

JOHN HAYDEN et al., Appellants, v. THE TERRITORY OF ARIZONA, Respondent.

APPEAL from the District Court of the First Judicial District in and for the County of Pima. O. T. Rouse, Judge.

Charles Blenman, for Appellants.

J. F. Wilson, Attorney-General, and William M. Lovell, for Respondent.

February 24, 1897. Affirmed.

[Civil No. 561.]

GEORGE HARVEY, Appellant, v. ARCHIE PRIEST, Appellee.

APPEAL from the District Court of the Third Judicial District in and for the County of Yuma. A. C. Baker, Judge.

Samuel Purdy, and Murat Masterson, for Appellant.

C. L. Brown, N. O. Hudson, and Fitch & Campbell, for Appellee.

February 25, 1897. Affirmed.

[Civil No. 549.]

LEWIS C. McNARY et al., Petitioners, v. GEORGE M. WALKER et al., Respondents.

APPEAL from the District Court of the Fourth Judicial District in and for the County of Yavapai. J. J. Hawkins, Judge.

E. M. Sanford, for Petitioners.

Robert E. Morrison, and J. F. Wilson, for Respondents.

February 25, 1897. Affirmed.

[Civil No. 567.]

E. J. AUSTIN et al., Appellants, v. WILLIAM YATES, Appellee.

APPEAL from the District Court of the Fourth Judicial District in and for the County of Yavapai. J. J. Hawkins, Judge.

T. W. Johnson, for Appellants.

Herndon & Norris, for Appellee.

February 25, 1897. Affirmed.

[Civil No. 540.]

HENRIETTA MINING AND MILLING COMPANY, Plaintiff in Error, v. HENRY JOHNSON, Defendant in Error.

ERROR to the District Court of the Fourth Judicial District in and for the County of Yavapai. John J. Hawkins, Judge.

Affirmed. 173 U. S. 221, 43 L. Ed. 675, 19 Sup. Ct. 402.

J. F. Wilson, and Barnes & Martin, for Plaintiff in Error.

Robert E. Morrison, and E. M. Sanford, for Defendant in Error.

February 26, 1897. Modified by striking out lien; otherwise affirmed.

[Civil No. 544.]

HENRIETTA MINING AND MILLING COMPANY,
Plaintiff in Error, v. SAMUEL HILL, Defendant in
Error.

ERROR to the District Court of the Fourth Judicial District in and for the County of Yavapai. John J. Hawkins, Judge.

Affirmed. 173 U. S. 225, 43 L. Ed. 677, 19 Sup. Ct. 877.

J. F. Wilson, for Plaintiff in Error.

Andrews & Ling, for Defendant in Error.

February 26, 1897. Modified by striking out lien; otherwise affirmed.

[Civil No. 542.]

M. J. NUGENT, Superintendent of the Territorial Prison,
Appellant, v. THE STATE OF ARIZONA IMPROVE-
MENT COMPANY, Appellee.

APPEAL from the District Court of the Third Judicial District in and for the County of Yuma. A. C. Baker, Judge.

J. F. Wilson, Attorney-General, for Appellant.

Eugene S. Ives, and L. H. Chalmers, for Appellee.

February 26, 1897. Affirmed.

[Civil No. 519.]

THE UNITED STATES OF AMERICA, Appellant, v.
WILLIAM C. DAWES et al., Appellees.

APPEAL from the District Court of the Fourth Judicial District in and for the County of Yavapai. J. D. Bethune, Judge.

E. E. Ellinwood, United States Attorney, for Appellant.

No appearance for Appellee.

February 26, 1897. Reversed.

[Civil No. 557.]

C. B. RELTON, Plaintiff in Error, v. COLIN CAMERON,
Defendant in Error.

ERROR to the District Court of the First Judicial District
in and for the County of Pima. J. D. Bethune, Judge.

Barnes & Martin, for Plaintiff in Error.

Rochester Ford, for Defendant in Error.

February 26, 1897. Dismissed.

[Civil No. 563.]

SAMUEL GOODMAN, Defendant, and R. E. DAGGS, Inter-
vener, Appellants, v. B. N. FREEMAN et al., Appellees.

APPEAL from the District Court of the Third Judicial
District in and for the County of Maricopa. A. C. Baker,
Judge.

A. J. Daggs, and J. B. Woodward, for Appellants.

Fitch & Campbell, and E. M. Doe, for Appellees.

February 26, 1897. Affirmed.

[Civil No. 564.]

SAMUEL GOODMAN, Defendant, and R. E. DAGGS, Inter-
vener, Appellants, v. B. N. FREEMAN et al., Appellees.

APPEAL from the District Court of the Third Judicial
District in and for the County of Maricopa. A. C. Baker,
Judge.

A. J. Daggs, and J. B. Woodward, for Appellants.

Fitch & Campbell, and E. M. Doe, for Appellees.

February 26, 1897. Affirmed.

[Civil No. 565.]

W. M. BILLUPS, Appellant, v. C. H. GRAY, Appellee.

APPEAL from the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge.

A. J. Daggs, for Appellant.

Fitch & Campbell, for Appellee.

February 26, 1897. Affirmed.

[Civil No. 553.]

JAMES E. WING, Appellant, v. A. S. CLOUGH, Appellee.

APPEAL from the District Court of the Fourth Judicial District in and for the County of Yavapai. A. C. Baker, Judge.

Herndon & Norris, for Appellant.

Robert E. Morrison, and J. F. Wilson, for Appellee.

March 16, 1897. Modified by allowing the appellee herein the exclusive use of all the water in said judgment mentioned during the first five days of every week and the appellant herein the exclusive use of all of said water during the last two days of every week. Otherwise affirmed.

[Civil No. 571.]

MAGGIE LESTON, Appellant, v. HORACE E. MAN, Appellee.

APPEAL from the District Court of the First Judicial District in and for the County of Cochise. John J. Hawkins, Judge.

Allen R. English, for Appellant.

Barnes & Martin, for Appellee.

March 17, 1897. Affirmed.

[Civil No. 517.]

E. O. STRATTON et al., Appellants, v. J. P. WELLS, Appellee.

APPEAL from the District Court of the Second Judicial District in and for the County of Pinal. Owen T. Rouse, Judge.

Charles Weston Wright, and Fletcher M. Doan, for Appellants.

Joseph H. Kibbey, and J. S. Sniffen, for Appellee.

March 17, 1897. Affirmed.

[Civil No. 439.]

GILA COUNTY, Appellant, v. J. H. THOMPSON et al., Appellees.

APPEAL from the District Court of the Second Judicial District in and for the County of Gila. Owen T. Rouse, Judge.

Cox & Street, for Appellant.

E. J. Edwards, W. H. Barnes, and Joseph Campbell, for Appellees.

March 17, 1897. Reversed.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
TERRITORY OF ARIZONA
DURING THE YEAR 1896.

[Civil No. 627. Filed January 26, 1898.]

[51 Pac. 977.]

E. B. GAGE, Plaintiff and Appellant, v. M. H. McCORD et al., Defendants and Appellees.

1. **BONDS—FUNDING ACT—ACT CONGRESS JUNE 6, 1896, SEC. 1, BEING 29 STATS. 262, CONSTRUED—JANUARY 1, 1897, NOT LIMIT UPON SALE.**—The act of Congress, *supra*, approved June 6, 1896, authorizing the funding of all outstanding obligations of the territory of Arizona, and the counties, municipalities, and school districts thereof, until January 1, 1897, authorizes the funding of all obligations which existed and were outstanding prior to January 1, 1897. Said date is not a limitation upon the sale and disposition of bonds for funding purposes.
2. **SAME—SAME—SAME—"ISSUE" DEFINED.**—The term "issue," as used in the Funding Act, means the arbitrary date fixed as the beginning of the term for which bonds are to run, without reference to the precise time when convenience or the state of the market may permit of their sale and delivery.
3. **SAME—SAME—BOARD OF LOAN COMMISSIONERS—CONTINUOUS BODY—CHANGE OF PERSONNEL—DOES NOT AFFECT BONDS "ISSUED."**—The board of loan commissioners is by law made a continuous body, and a change in the personnel of the board, occurring after the execution of bonds and their delivery to the treasurer, cannot affect the validity of these completed acts.
4. **SAME—SAME—NEGOTIATION—POWER OF SUCCESSORS IN OFFICE TO NEGOTIATE BONDS ISSUED BY PREDECESSORS.**—Bonds signed by the proper officers at their date can be negotiated and sold by their successors in office when there existed authority in the former to issue bonds at the time of signing, and when the authority was continued to the time of delivery.

5. SAME—SAME—NEGOTIATION—BONDS ISSUED—FORM—EXECUTION—SUFFICIENCY.—Under existing law, the loan commissioners and the territorial treasurer have power and authority to sell and dispose of bonds to fund outstanding obligations of the territory which accrued prior to January 1, 1897, and no new issue of bonds is needed for that purpose; those now in the hands of the territorial treasurer, and signed by the former territorial officials, being in all respects as to form and execution as provided by law.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge. Affirmed.

L. H. Chalmers, for Appellant.

C. M. Frazier, Attorney-General, for Appellees.

SLOAN, J.—The appellant brought suit in the court below, as a taxpayer, to enjoin the board of loan commissioners and the territorial treasurer from attempting to sell, hypothecate, or otherwise dispose of certain bonds issued by said board for the funding of territorial indebtedness, under the authority of the act of Congress approved June 25, 1890, and known as the "Funding Act." These bonds are alleged to bear date January 15, 1896, and to have been signed by B. J. Franklin, as governor, C. M. Bruce, as territorial secretary, and C. P. Leitch, as territorial auditor, and to have been countersigned by P. J. Cole, who was then and there the duly qualified and acting territorial treasurer; that, upon the execution of said bonds, they were by said loan commissioners delivered to the said territorial treasurer, and that ever since they have remained in the possession of said territorial treasurer and his successors in office, for disposition as provided by said Funding Act; that, since the execution of said bonds and their delivery to the territorial treasurer, the said persons composing the board of loan commissioners at the date of said execution and delivery have been succeeded in office by the appellees, M. H. McCord, as governor, Charles H. Akers, as secretary, and George W. Vickers, as auditor; and that the territorial treasurer who countersigned the said bonds has been succeeded in office by appellee C. W. Johnstone, who is now the duly qualified and acting territorial treasurer. The complaint alleges that the present board of loan commissioners and the

present territorial treasurer have arranged for the sale and disposition of the said bonds signed by the former loan commissioners and countersigned by the former territorial treasurer, and propose to use the proceeds thereof for funding and satisfying the fundable debts of the territory. The injunction is asked for upon three grounds, as stated in the complaint: First, the board of loan commissioners and the territorial treasurer have, since January 1, 1897, by congressional enactment, ceased to have any power or authority to negotiate, sell, or dispose of bonds for funding purposes; second, that even if the loan commissioners and treasurer have authority at this time to fund the outstanding territorial indebtedness, and for that purpose to dispose of territorial bonds, the bonds in question are invalid, and the officers of the territory have no authority to dispose of the same, because they are not signed by the present loan commissioners, and countersigned by the present territorial treasurer, but by their predecessors in office; third, that the said bonds are invalid, because not in the form as prescribed by law. We will consider these in their order.

In support of the first of these grounds contended for by appellant, reliance is had upon the provisions of the act of Congress approved June 6, 1896, which read as follows:—

“An act amending and extending the provisions of an act of Congress entitled ‘An act approving with amendments the funding act of Arizona,’ approved June twenty-fifth, eighteen hundred and ninety, and the act amendatory thereof and supplementary thereto, approved August third, eighteen hundred and ninety-four.

“Be it enacted by the senate and house of representatives of the United States of America in Congress assembled, that the provisions of the act of Congress approved June twenty-fifth, eighteen hundred and ninety, and August third, eighteen hundred and ninety-four, authorizing the funding of certain indebtedness of the territory of Arizona, are hereby amended and extended so as to authorize the funding of all outstanding obligations of said territory, and the counties, municipalities, and school districts thereof, as provided in the act of Congress approved June twenty-fifth, eighteen hundred and ninety, until January first, eighteen hundred and ninety-seven, and all outstanding bonds, warrants, and other evidences of in-

debtedness of the territory of Arizona, and the counties, municipalities, and school districts thereof, heretofore authorized by legislative enactments of said territory bearing a higher rate of interest than is authorized by the aforesaid funding act approved June twenty-fifth, eighteen hundred and ninety, and which said bonds, warrants, and other evidences of indebtedness have been sold or exchanged in good faith in compliance with the terms of the act of the legislature by which they were authorized, shall be funded, with the interest thereon which has accrued and may accrue until funded into the lower interest-bearing bonds as provided by this act.

"Sec. 2. That all bonds and other evidences of indebtedness heretofore funded by the loan commissioners of Arizona under the provisions of the act of Congress approved June twenty-fifth, eighteen hundred and ninety, and the act amendatory thereof and supplemental thereto, approved August third, eighteen hundred and ninety-four, are hereby declared to be valid and legal for the purposes for which they were issued and funded; and all bonds and other evidences of indebtedness heretofore issued under the authority of the legislature of said territory, as hereinbefore authorized to be funded, are hereby confirmed, approved, and validated, and may be funded as in this act provided until January first, eighteen hundred and ninety-seven: provided, that nothing in this act shall be so construed as to make the government of the United States liable or responsible for the payment of any of said bonds, warrants, or other evidences of indebtedness by this act approved, confirmed, and made valid, and authorized to be funded.

"Approved June 6th, 1896."

(29 Stats. 262.)

Stress is put upon the clause "until January first, eighteen hundred and ninety-seven," found in section 1 of the act, as bearing out the view that the purpose and intent of Congress was to limit the time within which the loan commissioners might act, and to require the completion of the work of funding, by the sale and disposition of bonds and the liquidation of the indebtedness allowed by this and prior acts to be funded, by January 1, 1897. Even were we restricted to the more literal meaning of the words used in construing remedial statutes of this kind, the narrow and circumscribed view thus

taken of the statute can hardly be justified if regard be had to the whole of the statute, including the plain purpose of the act as expressed in its title. In the latter, it is clearly stated to be an amendment of previous statutes and the extension and enlargement of their provisions. Again, an analysis of the body of the act bears out the view that, instead of the purpose being to limit or restrict the exercise of any powers, rights, or privileges previously granted, the legislative will was to add to, extend, and enlarge these. The first section contains two general provisions,—one authorizing the amendment and extension of the congressional acts approved, respectively, June 25, 1890, and August 3, 1894, so as to include in their provisions "all outstanding obligations" of the territory; the other directing the funding of all outstanding bonds, warrants, and other evidences of indebtedness of the territory, as well as of the counties, municipalities, and school districts thereof, which had been authorized by legislative enactments, and which bore a higher rate of interest than is authorized by the Funding Law, and which had been sold or exchanged in good faith. The second section likewise has reference to two classes of indebtedness, both of which are recognized obviously so as to confirm, approve, validate, and effectually fix their *status* as binding obligations upon the territory.

The acts of June 25, 1890, and August 3, 1894, being referred to, we must therefore consider the act of June 6, 1896, *in pari materia* with the former. The former act confirmed and approved, with amendments, chapter 1 of title 31 of the Revised Statutes, passed by the territorial legislature March 10, 1887. These amendments had reference to the rate of interest, the time bonds issued for funding purposes should run, and as to what indebtedness might be funded; the act being amended in this particular to include county, municipal, and school indebtedness. Congress added to the legislative enactment a provision that in effect validated a class of obligations otherwise invalid, because incurred in violation of the organic law of the territory, as found in the "Harrison Act," and provided for the funding of all the then existing and outstanding indebtedness, and that which might thereafter be evidenced by warrants issued for the necessary and current expenses of carrying on territorial, county, municipal, and school government for the year ending December 31, 1890.

and added to the foregoing the declaration that thereafter no warrants, certificates, or other evidences of indebtedness should be allowed to issue or be legal when the same is in excess of the limit prescribed by the Harrison Act. The act of August 3, 1894, provided "that an act entitled 'An act approving, with amendments, the funding act of Arizona,' approved June twenty-fifth, eighteen hundred and ninety, and paragraph twenty-two hundred and fifty-two (section fifteen) of said act, be and the same is hereby amended by adding thereto as follows: 'Provided, further, however, that the present outstanding warrants, certificates, and other evidences of indebtedness issued subsequent to December thirty-first, eighteen hundred and ninety, for the necessary and current expenses of carrying on the territorial government only, together with such warrants as may be issued for such purpose for the years ending December thirty-first, eighteen hundred and ninety-four, and December thirty-first, eighteen hundred and ninety-five, may also be funded and bonds issued for the redemption thereof; and thereafter no warrants, certificates, or other evidences of indebtedness shall be allowed to issue, or to be legal where the same is in excess of the limit prescribed by the Harrison Act.' " It is to be noted that, in both the acts referred to, the only limitation imposed had reference to the class of obligations which were permitted to be funded, and did not in any manner restrict the territorial officers in the method of their procedure previously prescribed by the territorial law, or limit the time within which the acts of funding, by the sale and disposition of bonds, might lawfully be done. Bearing in mind the remedial character of this legislation, and reading the act of June 6, 1896, in the light of the previous congressional enactments upon the same subject-matter, we construe the former act to express only what obviously appears to be the congressional intent,—viz., to extend and enlarge the class of obligations which may be funded, and not to limit the time within which the board of loan commissioners might complete the acts of funding indebtedness, which has expressly been recognized by Congress as fundable. We therefore read section 1 of this act as authorizing the funding of all obligations of the territory which existed and were outstanding prior to January 1, 1897, and not as limiting the sale and disposition of bonds for funding purposes by the loan

commissioners to the absurdly short period of six months for the successful accomplishment of the funding of the varied class of obligations validated and recognized by the act as fundable, and which necessarily amounted to large sums. It is not to be assumed that Congress would in one breath grant liberal and generous concessions, and in the next breath take away their practical benefits by the imposition of a seemingly unreasonable and unnecessary restriction, and thus defeat its own purpose and intent. It is to be noted that no contention is made that any of the indebtedness proposed to be funded by the sale and disposition of the bonds in question has been incurred since January 1, 1897, but the sole contention is as to the time within which the funding of the territorial indebtedness as limited by law may be done.

The objection to the sale and disposition, by the present officers, of the bonds signed by the former loan commissioners, and countersigned by the former territorial treasurer, is not supported by a reading of the various provisions of the Funding Act, or by authority. Section 2 of the Funding Act provides that the loan commissioners "shall from time to time issue negotiable coupon bonds of this territory." Section 4 provides that the bonds "shall bear the date of their issue, . . . and shall be signed by said loan commissioners, . . . and countersigned by the territorial treasurer." Section 6 directs that said commissioners shall from time to time after signing said bonds deliver them to the territorial treasurer, taking his receipt therefor, and charge him therewith. It is seen by the foregoing that the bonds must bear the date of their issue. It is important to inquire what is meant by the term "issue," as used in the statute. We adopt the definition of the supreme court of Washington in the case of *Yesler v. City of Seattle*, 1 Wash. 308, 25 Pac. 1014, upon a like question: "'Date of issue,' when applied to notes, bonds, etc., of a series, usually means the arbitrary date fixed as the beginning of the term for which they run, without reference to the precise time when convenience or the state of the market may permit of their sale or delivery." That this is the meaning intended is made clear by a provision in section 4, to the effect that bonds shall bear interest from the date of issue, but in no case shall interest be paid thereon for any time before their delivery to the purchaser. Section 7 prohibits the treasurer from selling the

bonds for less than their face value and the accrued interest at the time of disposal. The statute thus clearly recognizes that the execution of the bonds may precede their sale and delivery by a sufficient period of time to make it an object to require the sale to be for a sufficient amount to cover the par value of the bonds and the accrued interest thereon. To make these bonds the obligations of the territory under the statute, so far as the ministerial duties of the officers clothed with authority of their issuance and disposition go, it is essential that they be signed by the loan commissioners, countersigned by the territorial treasurer, and then by the former delivered to the latter; and, finally, they must be sold and delivered by the latter, or exchanged as provided by law. When the loan commissioners execute and deliver the bonds to the territorial treasurer, their ministerial duty is at an end. The board of loan commissioners is by law made a continuous body. By what reasoning or authority can a change in the personnel of the board, occurring after the execution of these bonds and their delivery to the treasurer, be held to affect the validity of these completed acts? We know of none. To hold otherwise means that a new issue of bonds must be made whenever, by death, resignation, removal, or otherwise, a change in any of the offices of governor, secretary, auditor, or treasurer occurs between the execution of any bonds and their delivery to a purchaser. Our attention has been called to the cases of *Weyauwega v. Ayling*, 99 U. S. 112; *Coler v. Cleburne*, 131 U. S. 162, 9 Sup. Ct. 720; and *Anthony v. Jasper County*, 101 U. S. 693, in support of the doctrine contended for. An examination of these cases will show that they are not in point. In *Weyauwega v. Ayling*, bonds bearing date June 1st, and purporting to be signed by the chairman of the board of supervisors and by the town clerk, were shown to have been signed by the person signing as clerk July 13th, at which date he had ceased to be clerk. The supreme court held these bonds good upon the presumption that they had been delivered with the assent of the clerk then in office. In *Coler v. Cleburne*, bonds were signed by the mayor of the city in office at their date, after he had been succeeded in office by another. The court held that the mayor in office at the time of their signing could alone lawfully sign the same. In *Anthony v. Jasper County*, the facts were that bonds required by law to be signed by the

presiding judge of the county court were in fact signed by one who had been succeeded in that office by another at the date of signing, and the bonds dated back to a time when he held office. If this latter case is an authority at all upon the question here presented, it is against the contention of appellant, inasmuch as the intimation of the court is strong that had the bonds been actually delivered by the proper officers, which was shown not to have been the case, they would have been valid, at least in the hands of innocent holders. No authority has been called to our attention, nor have we after diligent search found any, which holds that bonds signed by the proper officers at their date cannot be negotiated and sold by their successors in office, when there existed authority in the former to issue bonds at the time of the signing, and when the authority was continued to the time of delivery, which is the case of the bonds in question.

Upon the third point raised, we have carefully examined the form of the bonds proposed to be disposed of by the territorial treasurer, and find that it conforms in all particulars with that prescribed by the various acts of Congress relating thereto. We therefore hold that, under existing law, the loan commissioners and the territorial treasurer have power and authority to sell and dispose of bonds to fund outstanding obligations of the territory which accrued prior to January 1, 1897, and that no new issue of bonds is needed for that purpose; those now in the hands of the territorial treasurer, and signed by the former territorial officers, being in all respects as to form and execution as provided by law. The judgment of the court below sustaining the demurrer to the complaint, and dismissing the action, is affirmed.

Davis, J., and Doan, J., concur.

[Civil No. 619. Filed February 23, 1898.]

[52 Pac. 350.]

J. F. DAGGS et al., Plaintiffs and Appellants, v. J. H. HOSKINS, JR., et al., Defendants and Appellees.

1. APPEAL AND ERROR—ASSIGNMENT OF ERROR—SUFFICIENCY—"CONTENTIONS"—LAWS 1897, ACT NO. 71, APPROVED MARCH 18, 1897, CITED—RULES OF COURT CITED—ERROR APPARENT ON FACE OF RECORD.—The act, *supra*, provides that the brief of appellant shall contain a distinct enumeration in the form of propositions of the several errors relied on, and all errors not assigned in the printed brief shall be deemed to have been waived. The rules of this court, *supra*, likewise provide that all assignments of error must distinctly specify each ground of error relied upon. What are termed "contentions" in the brief of counsel for appellants do not meet the provisions of said statute or rule, and, no error being apparent on the face of the record, the judgment of the court below is affirmed.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Coconino. Owen T. Rouse, Judge. Affirmed.

The facts are stated in the opinion.

George W. Glowner, for Appellants.

Edward M. Doe, and Joseph Campbell, for Appellees.

PER CURIAM.—There are no sufficient assignments of error made by the appellants in their brief. The act of the legislature approved March 18, 1897, relating to appeals and writs of error, under the provisions of which this appeal is taken, provides, among other things, that "the brief of the plaintiff in error, or appellant, shall also next contain a distinct enumeration in the form of propositions of the several errors relied on, and all errors not assigned in the printed brief shall be deemed to have been waived." The rules of this court, likewise, provide that all assignments of error must distinctly specify each ground of error relied upon. What are termed "contentions" in the brief of counsel for appellants do not meet the provisions of the statute quoted above,

nor the requirements of the rules of this court. No error being apparent on the face of the record, the judgment of the court below is affirmed.

Street, C. J., Sloan, J., and Davis, J., concur.

[Civil No. 623. Filed February 23, 1898.]

[52 Pac. 353.]

DAN R. WILLIAMSON, Plaintiff and Appellant, v. GILA COUNTY, Defendant and Appellee.

1. OFFICE AND OFFICERS—SHERIFF—SALARY—GILA COUNTY—LAWS 1895, ACT No. 51, AND REV. STATS. ARIZ. 1887, PAR. 1989, CONSTRUED.—Act No. 51, *supra*, reclassifying counties for the purpose of fixing the compensation of county officers, and changing Gila County from a county of the third to one of the fifth class, deprives the board of supervisors of said county of the power of allowing a salary to the sheriff, in addition to his fees, under paragraph 1989, *supra*, which provides that in a county of the third class the sheriff, in addition to fees, might receive such salary as the board of supervisors should allow, not exceeding six hundred dollars.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Gila. Fletcher M. Doan, Judge. Affirmed.

The facts are stated in the opinion.

Peter R. Robertson, for Appellant.

E. J. Edwards, District Attorney, for Appellee.

SLOAN, J.—The appellant sued the appellee in the court below to recover the sum of one hundred dollars, salary alleged to be due as sheriff for the quarter ending June 30, 1897. Appellant based his right to recover upon an order made and entered by the board of supervisors of Gila County at their regular meeting, in July, 1897, fixing the salary of the sheriff of said Gila County for the years 1897 and 1898, under the provisions of paragraph 1989 of the Revised Stat-

utes, at the sum of four hundred dollars per annum. The appellee demurred to the complaint in the action, which demurrer was by the court sustained; and from this order of the court appellant brings his appeal.

The sole question presented here is whether the sheriff of Gila County, during the years 1897 and 1898, is entitled to receive any salary under an order of the board of supervisors made under the provisions of said paragraph 1989. This section provided that in a county of the third class the sheriff, in addition to the fees enumerated in the Fee and Salary Act, might receive such salary as the board of supervisors, by an order entered on their minutes, might allow, not exceeding the sum of six hundred dollars. Prior to the 21st of March, 1895, the various counties of the territory were divided into three classes, for the purpose of fixing the compensation of county officers. The county of Gila was, under this classification, a county of the third class. On March 21, 1895, the legislature reclassified the counties of the territory for the purpose of fixing the compensation of county officers, under which classification the county of Gila became a county of the fifth class. Laws 1895, Act No. 51, p. 62. The latter act made no provision for any salary to be paid to the sheriff, as sheriff, in any of the counties of the territory. Appellant contends that the reclassification of the counties by this act had no effect to take the county of Gila out of the class of counties in which the sheriff is permitted a salary, as provided by section 1989 of the Revised Statutes. It was wholly by reason of the fact that Gila County was of the third class of counties that the board of supervisors had any power to allow, by order, a salary to the sheriff in addition to the fees otherwise provided by law. It is true that a similar provision was found in paragraph 1988, which pertained to counties of the second class; but by paragraph 1987 it is found that no salary or compensation other than the fees enumerated in the Fee and Salary Act could be allowed county officers except assessors. It was clearly, therefore, the intention of the legislature, at the time the Fee and Salary Law (as contained in chapter 2 of title XXVIII of the Revised Statutes, of which the paragraph referred to was a part) took effect, that only should sheriffs and other county officers in certain classes of counties be entitled to any salary in addition to the other

compensation allowed them by law. The legislature, therefore, in providing for a new classification of counties, and in omitting to provide for salaries to be paid to sheriffs in addition to the other compensation allowed by law, must be presumed to have intended that only in such counties as came within the class in which such salaries had been allowed by prior enactment could such compensation be paid. The county of Gila, now being a county of the fifth class, is no longer within the class of counties in which such compensation is allowed; and the appellant, therefore, was not entitled to recover for the salary sued for. The judgment of the court below is therefore affirmed.

Street, C. J., and Davis, J., concur.

[Criminal No. 127. Filed February 23, 1898.]

[52 Pac. 352.]

WILLIAM SCHULTZ, Defendant and Appellant, v. TERRITORY OF ARIZONA, Plaintiff and Respondent.

1. CRIMINAL LAW—ALIBI—BURDEN OF PROOF.—The burden of proof is not on the defendant in a criminal prosecution to prove an *alibi*, and if, by reason of the evidence in relation to such *alibi*, the jury should doubt defendant's guilt, he would be entitled to an acquittal, although the jury might not be able to say the *alibi* had been fully proved.
2. WITNESSES—SWEARING FALSELY TO MATERIAL FACT—DISREGARDING TESTIMONY—INSTRUCTION.—It is error to instruct that the whole testimony of a witness who has sworn falsely as to a material fact may be disregarded. Before the jury can disregard the testimony of a witness it must appear that the witness has knowingly and intentionally sworn falsely.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Yavapai. J. J. Hawkins, Judge. Reversed.

The facts are stated in the opinion.

W. H. Barnes, for Appellant.

C. M. Frazier, Attorney-General, H. D. Ross, District Attorney, and P. W. O'Sullivan, Assistant District Attorney, for Respondent.

DAVIS, J.—The defendant, William Schultz, was tried at the June term, 1897, of the district court of Yavapai County, upon an indictment charging him with murder. He was convicted of manslaughter, and sentenced to a term of ten years' imprisonment in the territorial prison. The appeal is from the judgment of conviction, and from an order denying the defendant's motion for a new trial.

The appellant bases his contention for reversal upon two instructions given by the trial court at the request of the prosecution. One of these instructions was in the following language: "The court instructs the jury that the defendant claims, as one of his defenses, what is known in law as an *alibi*; that is, that, at the time the homicide with which he is charged was committed, he was at a different place, so that he could not have participated in its commission. The burden is upon the defendant to prove this defense for himself, by a preponderance of evidence; that is, by the greater and superior evidence. The defense of *alibi*, to be entitled to consideration, must be such as to show that, at the very time of the commission of the crime charged, the accused was at another place, so far away or under such circumstances that he could not with any ordinary exertion have reached the place where the crime was committed so as to have participated in the commission thereof." While conceding that it is not without authority for its support, we do not think this instruction fairly and correctly states the law applicable to the defense of *alibi*. The burden of proof never rests upon the accused to show his innocence, or to disprove the facts necessary to establish the crime with which he is charged. The defendant's presence at, and participation in, the *corpus delicti*, are affirmative material facts that the prosecution must show beyond a reasonable doubt to sustain a conviction. For the defendant to say he was not there is not an affirmative proposition; it is a denial of the existence of a material fact in the case. He meets the evidence of the prosecution

by denying it. If a consideration of all the evidence in the case leaves a reasonable doubt of his presence, he must be acquitted. We hold that the instruction given may have misled the jury to the prejudice of the rights of the defendant. It, in effect, said to the jury that evidence tending to show such *alibi* is not to be considered in favor of the defendant, unless it outweighs all the evidence in opposition to it. We think it was the duty of the trial judge to have said to the jury that they must consider all the evidence in the case, including that relating to the *alibi*, and determine from the whole evidence whether it was shown beyond a reasonable doubt that the defendant had committed the crime with which he was charged. The burden of proof was not changed when the defendant undertook to prove an *alibi*, and if, by reason of the evidence in relation to such *alibi*, the jury should doubt the defendant's guilt, he would be entitled to an acquittal, although the jury might not be able to say that the *alibi* had been fully proved. *People v. Nelson*, 85 Cal. 421, 24 Pac. 1006; *People v. Tarm Poi*, 86 Cal. 225, 24 Pac. 998; *Walters v. State*, 39 Ohio St. 215; *Davis v. United States*, 160 U. S. 469, 16 Sup. Ct. 353.

The other instruction complained of was as follows: "The court instructs the jury that if they find from the evidence, beyond a reasonable doubt, that any witness in this case has sworn falsely as to any material fact, then the jury may disregard the whole testimony of such witness, except in so far as it is corroborated by other credible testimony." This instruction was also erroneous. Before the jury can disregard the testimony of a witness, it must appear that the witness has knowingly and intentionally sworn falsely. A witness might testify falsely, and yet be honest; and the mistake of one who ignorantly and unintentionally testifies falsely is not sufficient to permit his entire testimony to be disregarded. As was said by this court in *Follett v. Territory*, 4 Ariz. 91, 33 Pac. 869: "The maxim, *Falsus in uno, falsus in omnibus*, applies only in case the witness has knowingly and willfully sworn falsely." This instruction is also condemned in *Pope v. Dodson*, 58 Ill. 365; *McClure v. Williams*, 65 Ill. 392; *Barney v. Dudley*, 40 Kan. Sup. 247, 19 Pac. 550; *Hillman v. Schwenk*, 68 Mich. 293, 36 N. W. 77; *Express Co. v. Hutchins*, 58 Ill. 44; *Swan v. People*, 98 Ill. 610.

For the erroneous instructions given, the judgment and order appealed from are reversed and the cause remanded for a new trial.

Street, C. J., and Doan, J., concur.

Sloan, J., not sitting.

[Civil No. 612. Filed February 23, 1898.]

[52 Pac. 356.]

COCHISE COUNTY, Defendant and Appellant, v.
CHARLES G. JOHNSTON, Plaintiff and Appellee.

1. OFFICE AND OFFICERS—COURT COMMISSIONERS NOT COUNTY OFFICERS—FEES AND SALARY—HABEAS CORPUS—REV. STATS. ARIZ. 1887, PARS. 647, 1967, 577, CONSTRUED.—A court commissioner, appointed pursuant to paragraph 647, *supra*, whose compensation is fixed by paragraph 1967, *supra*, at four dollars for each day employed, and fifty cents for each order, is not a county officer, and therefore is not within the provisions of paragraph 577, *supra*, relating to salaries and fees of county officers, providing "no fee or compensation . . . must be charged . . . by any officer . . . for services rendered upon *habeas corpus*."
2. SAME—COUNTY OFFICERS—FEES—SALARY—HABEAS CORPUS—REV. STATS. ARIZ. 1887, PAR. 577, CONSTRUED—BENEFIT OF PETITIONER.—Paragraph 577, *supra*, is a provision for the benefit of those who may apply for the writ of *habeas corpus*, and is not intended to be an immunity of the county from paying county officers for such services.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Cochise. George R. Davis, Judge. Affirmed.

The facts are stated in the opinion.

Allen R. English, District Attorney, for Appellant.

Barnes & Martin, for Appellee.

PER CURIAM.—The appellee, Charles G. Johnston, sued the county of Cochise to recover the amount of an account

which he had presented to the board of supervisors, and by them disallowed, in the sum of \$128.50, for services rendered as court commissioner. The district court gave judgment in favor of plaintiff upon the said claim for \$112. The appellee was district court commissioner for Cochise County, and the question raised by this appeal is whether a court commissioner is entitled to *per diem* or compensation in matters of issuing writs and hearing cases in *habeas corpus*.

Paragraph 1967 of the Revised Statutes of Arizona provides: "The fees of the court commissioner are as follows: For each day employed, \$4.00; for each order, \$.50." Paragraph 577 of chapter 13 of title XIII, relating to counties and the salaries and fees of county officers, says: "No fee or compensation of any kind must be charged or received by any officer for duties performed or services rendered in proceedings upon *habeas corpus*." Appellant contends that, under that provision, the court commissioner of the district court is not entitled to any fee or compensation of any kind in proceedings upon *habeas corpus*. It is the opinion of this court that such provision relates to county officers alone. The court commissioner is not such a county officer as to come within the provisions of that statute. He is appointed under the provisions of paragraph 647 of the Revised Statutes of Arizona, which is as follows: "The judges of the several judicial district courts of this territory may appoint one commissioner in each county where such judge is authorized to hold a session of the district court, which commissioner shall reside at the county-seat of the county for which they are appointed. Such commissioners shall have the power of the district judge at chambers, as to all business cognizable in their county, arising on a question of *habeas corpus*, and all orders, writs, and injunctions, except that he shall not make any final determination except on writs of *habeas corpus*; they may also on request of the district attorney of their county, issue a venire for grand and trial jurors, and may also in the absence of the judge, and under his direction, communicated by telegraph or otherwise, open and adjourn any term of court the same as the judge might do if personally present." He stands in the place of the judge, to act in his absence. He is a district court officer, and the fees prescribed by paragraph 1967 provide for his compensation in cases of *habeas corpus*, the same as in

any other work, civil or criminal, which he may be called upon to perform by virtue of his commission from the district judge. Furthermore, we are of opinion that paragraph 577 is a provision for the benefit of those who may apply for a writ of *habeas corpus*, and a safeguard against their being denied a writ, when they are unable or unwilling to pay the county officers for the process relating to the same, and is not intended to be an immunity of the county from paying county officers for such services. The judgment of the district court is affirmed.

Street, C. J., Doan, J., and Sloan, J., concur.

Davis, J., not sitting in the case, having been trial judge in the court from which the appeal was taken.

[Civil No. 598. Filed February 23, 1898.]

[52 Pac. 359.]

MANUEL G. LEVY, Plaintiff and Appellant, v. R. N. LEATHERWOOD, Defendant and Appellee.

1. CLAIM AND DELIVERY—PLEADING—ISSUES—FAILURE TO DEMAND RETURN OF PROPERTY—REV. STATS. ARIZ. 1887, PARS. 202, 203, 204, CONSTRUED.—In an action of claim and delivery, where plaintiff has given a bond, taken possession of the property, and disposed of the same before trial, and defendant has in his answer made no demand for the return of the property taken, under statutes, *supra*, the value of the property taken was not an issue to be tried under the pleadings.
2. SAME—TRIAL—JURY—ASSESSING VALUE—REV. STATS. ARIZ. 1887, PAR. 202, CONSTRUED.—Where the value of the property is an issue in the trial of an action of claim and delivery before a jury it is error for the court to assess the value. That is for the jury. Statutes, *supra*, construed.
3. SAME—JUDGMENT—SPECIAL INTEREST—SHERIFF—VALUE OF INTEREST—EVIDENCE.—Where in an action of claim and delivery the answer of defendant sets up a special interest as sheriff, by virtue of levies under writs of attachment, the court can only assess the value of such special interest as shown by the amounts as claimed in such writs, with costs; or in case judgments had been rendered

in such attachment suits, then for the amount of the judgments and interest.

4. SAME—JUDGMENT—DAMAGES—WHERE PLAINTIFF HAS DISPOSED OF PROPERTY—REV. STATS. ARIZ. 1887, PAR. 203, CONSTRUED—PLEADING—ISSUES.—Where in an action of claim and delivery the evidence shows that plaintiff has disposed of the property replevied, judgment can properly be had for defendant under paragraph 203, *supra*, for damages suffered by him for the taking or detention of the property, or both; and where the defendant in his answer did not set up any claim for damages or make any demand for the same, no judgment can be had therefor.
5. APPEAL AND ERROR—MODIFICATION OF JUDGMENT—RENDERING ERROR HARMLESS—AVERTS NECESSITY FOR NEW TRIAL.—Where the jury found the main issue for the appellee, and the court instead of the jury thereupon assessed damages against appellant, which action of the court the appellant assigns as error, and it appears that under the pleading no damages could be assessed, a modification of the judgment of the trial court to conform to the pleadings and verdict renders such error harmless, and averts the necessity of a new trial.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. J. D. Bethune, Judge. Reversed.

The facts are stated in the opinion.

C. W. Wright, for Appellant.

The court erred in rendering a judgment on the verdict for the return of the property to appellee, the answer not demanding such return.

Paragraph 202 of our code provides that where the possession of the property has been turned over to the plaintiff under the writ, as was done in this case, and he fails to "prosecute his action with effect," as he did in this case, and the defendant in his answer claims the same, and demands a return thereof, "the court or jury may assess the value of the property taken," etc.

Paragraph 203 provides: "In such case, the judgment shall be against the plaintiff and his sureties, that he return the property taken, or pay the value so assessed."

"In such case," the statute tells us,—that is, the case provided in paragraph 202; and that case is where the possession of the property has gone to the plaintiff, where the

answer claims it and demands its return, and where the plaintiff loses the suit, then "judgment shall be against the plaintiff and his sureties, that he return the property taken, or pay the value so assessed."

The answer in this case does not claim the property, nor does it demand its return. This being true, can the court enter a judgment for its return?

Our statute is copied from section 667 of the Code of Civil Procedure of California. Before we adopted it, it had been construed by the supreme court of that state. Therefore, we presumptively adopted the construction that had been given to it. In the case of *Pico v. Pico*, 56 Cal. 459, the court answers this question in the negative. It says: "Nevertheless, a defendant cannot have judgment for a return of the property or its value, unless he has claimed a return in his answer."

Barnes & Martin, for Appellee.

SLOAN, J.—Appellant sued the appellee for the recovery of the possession of personal property described in the complaint as "the store known as the 'New York Store,' the same being situated on the corner of Main and Congress streets, in the city of Tucson, county of Pima, Arizona Territory, together with and including the stock of merchandise now in said store, and each and all thereof, and also all furniture and fixtures and personal property of every kind and nature now in the building, also known as the 'New York Store,' as aforesaid, said store building not being included therein, but all personal property is included therein." The prayer of the complaint was for the recovery of the possession of said property, or for the sum of \$4,005, the value thereof, if the possession could not be had, and for damages and for costs of suit.

In accordance with the provisions of the Claim and Delivery Act, the appellant, at the time of the institution of his action, filed his affidavit, gave a bond with two sureties, took the property sued for into his possession, and, as the testimony shows, subsequently, and before the trial, sold and disposed of the same. The appellee filed a general denial to the complaint, and, by way of further answer, set up that the appellant claimed ownership and the right to the possession

of the property sued for under and by virtue of a certain bill of sale made by Miller & Lowenstein, the former owners of the property, which bill of sale was alleged to have been fraudulent and void, for the reason that it was made without consideration, and was a fraudulent preference of appellant over other *bona fide* creditors of said firm of Miller & Lowenstein, and was made with the fraudulent intent to hinder, defraud, and delay said other creditors. Appellee further alleged that he was entitled to the possession of said property by virtue of having, in his office of sheriff, levied upon said property under and by virtue of several writs of attachment issued out of the district court in and for said Pima County, in suits brought by creditors of Miller & Lowenstein. No demand was made by appellee in his answer for a return of the property replevied as aforesaid by appellant. On the issues thus presented by the pleadings, the cause was submitted to the jury, and the following verdict returned: "We, the jury, duly impaneled and sworn in the above-entitled cause, upon our oaths do find for the defendant." Thereupon the court assessed the value of the property taken under the writ of replevin at \$4,005, and entered judgment against the appellant and his sureties upon the replevin bond for a return of the property sued for, or, in case a return could not be had, adjudged that appellee and his said sureties pay the value thereof alleged in the complaint, and fixed by the plaintiff in his affidavit for writ of replevin, and assessed at the sum of \$4,005, and further adjudged that the appellee should recover of appellant and the said sureties his costs and disbursements in the action.

Numerous assignments of error are made by the appellant in his brief, but the principal error complained of is that the court, and not the jury, assessed the value of the property taken under the writ of replevin, and adjudged that the appellant return the property taken under the writ, or that he and his sureties pay to the appellee the value of the property taken as assessed by the court. The error complained of involves the construction of paragraphs 202 to 204, inclusive, of the Revised Statutes, being sections 11 to 13, inclusive, of the Claim and Delivery Act. These sections read as follows:—

"202 (11). If the plaintiff fail to prosecute his action

with effect and without delay, and shall have the property in his possession, and the defendant in his answer claims the same and demands a return thereof, the court or a jury may assess the value of the property taken, and the damages for taking and detaining the same, for the time such property was taken or detained from defendant until the day of the trial of the cause.

"203 (12). In such case, the judgment shall be against the plaintiff and his sureties, that he return the property taken, or pay the value so assessed, at the election of the defendants, and, also, pay the damages assessed for the taking and detention of the property and costs of suit.

"204 (13). If the plaintiff has not the property in possession, damages shall be assessed as directed in section eleven for the taking or detention, or both, as the case may be, of the property, and judgment shall be rendered against the plaintiff, and his sureties for the damages, if any, and for costs of suit."

Paragraph 202 clearly provides that, in case the property in controversy be in possession of the plaintiff in the action at the time of the trial, and the defendant in his answer has made claim to the same and demanded a return thereof, the value of the property taken, and the amount of damages due the defendant for taking and detaining the same, are issues of fact to be determined by the court, if the trial be by the court, or by the jury, if the trial be by jury, in the event that the plaintiff in the action has failed to prosecute his action with effect and without delay. In such case, paragraph 203 provides what kind of a judgment shall be had against the plaintiff and his sureties, and it is made mandatory upon the court to adjudge a return of the property taken, or that the plaintiff and his sureties shall pay the value of the property as assessed, at the election of the defendant, and shall also pay such damages as may be assessed for the taking and detention of the property, together with the costs. The value of the property assessed, if made an issue by the defendant in his answer, is a question of fact to be determined by the court or jury, as the case may be; but, unless made an issue, should the defendant recover, the court or jury can only find upon the general issue and enter judgment accordingly. Our statute in this particular is unlike any other with which we are

familiar, in that it grants a defendant the privilege of claiming the property replevied from him, and, in case he prevail, having its value assessed, so that judgment may be had for its return, or for its value, as he shall elect. In this case the appellee did not demand a return of the property replevied, and therefore, under the statute, the value of the property taken was not an issue to be tried and determined under the pleadings. But, even had the appellee claimed a return of the property in his answer, the action of the court in assessing the value, and not the jury, was irregular. The provision in the statute that the court or jury may assess the value of the property taken must be construed as meaning that the court may so assess the value when the cause is tried by the court, and that the jury shall assess the value when the cause is tried by the jury. This court has held in the case of *Carroll v. Byers*, 4 Ariz. 158, 36 Pac. 499, that the action of claim and delivery is but a modification of the common-law remedy of replevin, and that a trial by jury is a matter of right in such actions. It would certainly be an anomaly in jury practice, in such cases, to submit certain issues of fact to the jury, and for the court to find upon other issues of fact, and enter a judgment accordingly. Again, had the value of the property taken been an issue in the case, it could only properly, in this case, have been the value of the special interest possessed by the appellee, as sheriff, under and by virtue of his levies under his writs of attachment. A judgment could only have been rendered for the amounts, as claimed in said writs, with the costs accruing therein, if judgments had not been rendered in the attachment suits, or, in case judgments had been rendered, then for the amounts of these judgments and the interest thereon. This would be the extent of the special ownership in the property, and the value of this special ownership could alone be the basis for the money judgment against the appellant, and not the value of the property as assessed and adjudged by the court below. *Shahan v. Smith*, 38 Kan. 474, 16 Pac. 749; *Bleiler v. Moore*, 88 Wis. 438, 60 N. W. 792; *Fowler v. Hoffman*, 31 Mich. 221. Again, the testimony showed that at the time of the trial the appellant did not have the property in his possession. The case is therefore governed by paragraph 203, which provides, in effect, that if judgment shall be against the plaintiff, and

he have not the property in his possession, ~~but~~ jury, if the cause be tried by a jury, shall assess the damages which the defendant may have suffered by reason of the taking or detention of the property, or both, as the case may be; and further provides that judgment in such case shall be rendered against plaintiff and his sureties for such damages and for costs of suit. This case, therefore, properly comes under this latter paragraph of the statute, rather than the former. In the one case, the jury are to find the value of the property; in the other case, the jury are to assess the damages for the taking or detention of the property, or both. In neither case may the court find the value, or the damages, where the main issue is submitted to a jury. The appellee in his answer did not set up any claim for damages or make any demand for the same. At the trial no request was made of the court to instruct the jury to find upon the question of damages, although it appears appellee did request of the court an instruction that the jury find the value of the property taken, which request was by the court refused. The request for this instruction, aside from the question of pleading, was properly refused; for, as we have before seen, the testimony at the trial showed that the appellant did not have the property in his possession at the time of the trial, and therefore the sole question which could have been properly presented to the jury, aside from the main issue, was the damages for the taking and detention of the property. Under the pleadings as they exist, and under the submission to the jury of the general issue only, and under the verdict of the jury which found for the appellee upon the main issue merely, the question is presented as to whether or not we should reform the judgment of the court below so as to conform to the verdict and the pleadings, or award the appellant a new trial. This matter should be determined upon the question as to whether the appellant has been harmed by the failure of the court to submit the question of damages to the jury, and the consequent failure of the jury to find upon this question. We are unable to see how, in this particular, the appellant was injured. On the contrary, we conceive that the omission was to his advantage, and therefore a modification of the judgment, in the particulars in which said judgment was not based upon the issues and upon the verdict, is all that he can prop-

erly ask for, unless other error affecting the verdict has been committed. We do not find, upon an examination of the points raised by appellant in his brief, that reversible error was committed by the trial court which calls for the setting aside of the verdict and the granting of a new trial. The judgment of the court below will therefore be reversed, and the court instructed to enter judgment in accordance with the verdict of the jury. The costs of the appeal will be taxed against the appellee.

Street, C. J., Davis, J., and Doan, J., concur.

[Criminal No. 123. Filed February 23, 1898.]

[52 Pac. 358.]

CHARLES HACKETT, Defendant and Appellant, v. TERRITORY OF ARIZONA, Plaintiff and Respondent.

1. **APPEAL AND ERROR—REVIEW—CONFLICT OF EVIDENCE—CRIMINAL LAW—ASSAULT WITH INTENT TO COMMIT MURDER—DEFENSE—VOLUNTARY DRUNKENNESS—INSTRUCTIONS.**—Where the defense to a prosecution for assault with intent to commit murder is voluntary drunkenness, and the jury, being correctly instructed that such drunkenness, if proved, may be considered for the purpose of determining whether the accused at the time of the alleged offense was capable of forming the specific intent necessary to constitute the crime, has found the defendant guilty, this court will not weigh conflicting evidence as to his condition nor interfere with the verdict where there is evidence to support it.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Coconino. R. E. Sloan, Judge. Affirmed.

The facts are stated in the opinion.

E. E. Ellinwood, for Appellant.

C. M. Frazier, Attorney-General, for Respondent.

DOAN, J.—The record in this case shows that the appellant, Charles Hackett, was indicted on the fifth day of Au-

gust, 1897, in the county of Coconino, territory of Arizona, for an assault with intent to murder one John Giblin, to which indictment he pleaded not guilty; that on the sixth day of August trial was had by jury, and on the seventh day of August a verdict of guilty was rendered. The appellant makes one assignment of error in the proceedings below,—namely, “That the verdict is contrary to the law and the evidence,”—and, having filed a transcript of the proceedings in the lower court, and of all the evidence taken upon the trial, presents the same to this court for its consideration. The evidence was unanimous to the effect that the appellant (Hackett) assaulted a drunken man, who was too drunk to make any resistance; that Giblin, a stranger, who was at the time unarmed, and happened to be passing by, approached, and told appellant “not to strike him; he was drunk,” etc., whereupon appellant drew a knife from his pocket, and plunged it into Giblin’s body, inflicting a wound in his side penetrating the walls of the chest. Giblin had the wound sewed up by a surgeon, and recovered. The direct testimony of all the witnesses to the affair fully supported these facts, gave the circumstances in detail, and was absolutely uncontradicted. There was no question or conflict of evidence in regard to the fact or circumstances of the stabbing of Giblin by the appellant, nor in regard to the nature of the wound inflicted. The only variance in the testimony was in regard to the condition of appellant at the time of the assault. In regard to this, one witness testified that he “was sober,” and another that “he was drinking a little.” These were eye-witnesses of the transaction. Their testimony was practically identical as to the other features and circumstances of the case. They testified, as quoted, in reply to the direct question propounded by counsel for defendant, as to the condition of Hackett at the time. This was all the testimony adduced as to Hackett’s intoxication at the time he made the assault. Another witness of the cutting, whose testimony corroborated these in other particulars, was not asked, and did not testify, as to the condition of Hackett. A witness who arrived after the cutting, and to whom Hackett gave the knife used on the occasion, testified that “he was drunk, very drunk.” This testimony, however, only goes to his condition at time of delivering the knife, and can only be inferentially attached to

the former time when the assault was made. Hackett was a witness in his own behalf, but only said on this point that he had "been drinking all day," and in reply to the question, "How much had you been drinking?" answered, "I don't know how much I was drinking; I was drinking all day"; and in reply to "How this came up—this cutting?" his reply was, "I have a slight remembrance of having a racket with some one; I don't know who it was." After all the evidence was in, the court instructed the jury: "You will observe that the gist of this offense is the intent, and the specific intent is that to commit the crime of murder as defined by our statute. . . . The intent with which an act is done is to be inferred from all the facts and circumstances attending its commission. . . . That the defendant, at the time charged, bore malice toward Giblin or another, is not sufficient under this indictment, but there must exist the premeditated specific intent to murder said Giblin. . . . It is incumbent upon the territory to prove beyond a reasonable doubt all the material allegations of the indictment, among which, in this case, is that the defendant made the alleged assault with a specific and premeditated intent to commit murder. The rule that the burden of proving justification, excuse, and mitigating circumstances shifts to the defendant has no application to the trial of an assault to commit murder, but the burden at all times rests on the prosecution. . . . While it is a general rule of law that voluntary drunkenness is no excuse for a crime perpetrated under its influence, still, in cases of this kind, drunkenness, if proved, may be considered by the jury for the purpose of determining whether the accused at the time of the alleged offense was capable of forming a willful, deliberate, and premeditated design to commit murder; and in this case, although the jury may believe from the evidence beyond a reasonable doubt that the defendant assaulted the said John Giblin in the manner and form as charged, still, if you further believe from the evidence that before and at the time the defendant struck the blow he was so deeply intoxicated by spirituous liquors as to be incapable of forming in his mind a design deliberately and premeditatedly to commit the crime of murder under such intoxication, then the defendant cannot be found guilty of the crime of an assault with intent to commit murder." This question of intent is

a question of fact for the jury to determine. They have determined it. Their verdict of "guilty as charged," after hearing the evidence, and considering the same under the instructions of the court, which clearly and correctly state the law, and which were not only definite and explicit, but were decidedly full and fair to the defendant on this point, shows conclusively that in the minds of the jury the facts showing the intent were fully established by the evidence, and that the testimony tending to show the drunkenness of the defendant at the time he committed the offense was not sufficient to raise in the minds of the jury a reasonable doubt of either his ability to form, or the fact that he did form, such intent at the time he struck the blow. It is a principle of law too well settled to necessitate the citation of authorities that an appellate court will not weigh the evidence in a case, or decide upon the preponderance of evidence, where there has been conflicting evidence decided upon by a jury, nor interfere in cases where there has been a verdict rendered with material evidence tending to support it. In this instance the record shows that the evidence was presented fairly on this point. The instructions asked by and given for the defendant recognized the existence of, and were based upon the importance of, such evidence. The jury heard the testimony, saw the bearing and demeanor of the witnesses who gave it, had their attention directed by the court to the importance of this feature of the case, were qualified to judge of the relative weight and merit of all of the evidence. After long and mature deliberation, they decided upon it, and their verdict will not be disturbed by this court. Judgment of lower court affirmed.

Street, C. J., Davis, J., and Sloan, J., concur.

[Criminal No. 125. Filed February 23, 1898.]

[52 Pac. 350.]

GEORGE CLUFF, Defendant and Appellant, v. TERRITORY OF ARIZONA, Plaintiff and Respondent.

1. CRIMINAL LAW—FRAUDULENT CLAIMS AGAINST COUNTY—INDICTMENT—SUFFICIENCY—REV. STATS. ARIZ. 1887, PENAL CODE, PAR. 105, AND CIVIL CODE, PAR. 1574, CITED AND CONSTRUED.—An indictment under paragraph 105, *supra*, which provides that every person who, with intent to defraud, presents for payment to any territorial or county officer authorized to pay the same, if genuine, any false or fraudulent claim is guilty of a felony, fails to state facts sufficient to constitute a public offense, where it charges that the defendant Cluff presented a fraudulent school-warrant drawn in favor of Wild, or order, to the county treasurer for payment, he being authorized to pay the same if genuine, but fails to allege that it was indorsed by Wild to defendant, or that it contained any indorsement whatever when presented for payment, as by express provision of paragraph 1574, *supra*, the treasurer was only permitted to pay the money on such warrant when "duly indorsed by the person entitled to receive the same."

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Graham. Owen T. Rouse, Judge. Reversed.

The facts are stated in the opinion.

John McGowan, for Appellant.

C. M. Frazier, Attorney-General, and Wiley E. Jones, District Attorney, for Respondent.

DAVIS, J.—The appellant was convicted of a violation of paragraph 105 of the Penal Code, which provides: "Every person who, with intent to defraud, presents for allowance or for payment to any territorial board or officer, or to any county, town, city, ward, or village board or officer, authorized to allow or pay the same if genuine, any false or fraudulent claim, bill, account, voucher, or writing, is guilty of felony." The charging part of the indictment upon which the prosecution was based is as follows: "The said George

Cluff, on or about the sixth day of February, A. D. 1896, and before the finding of this indictment, at the county of Graham, territory of Arizona, willfully, unlawfully, feloniously, and with intent to defraud the said county, then and there did present to the legally elected, qualified, and acting treasurer of said county, for payment, a certain fraudulent claim and warrant, partly written and partly printed, said claim and warrant then and there being in words and figures as follows, to wit: 'No. 370. Feby. 6th, 1896. The treasurer of Graham County will pay out of any moneys to the credit of school district No. 14 to Wallace W. Wild, or order, sixty dollars, on account of teaching January in Layton School District during the school year ending June 30, 1896. \$60.00. GEORGE CLUFF, County School Superintendent,'—said claim and warrant being fraudulently drawn for said sum of sixty dollars, and issued upon a certain voucher authorizing the issuance of a warrant for the sum of fifty dollars, and no more; said George Cluff, so presenting said claim and warrant, then and there well knowing the same to have been fraudulently drawn for said sum of sixty dollars, instead of said sum of fifty dollars, authorized by said voucher; said treasurer then and there being authorized to pay said warrant, if genuine." The defendant's motion for a new trial was overruled, and he was sentenced to confinement in the territorial prison for a term of eighteen months. He appeals from the judgment. The indictment was demurred to on the grounds,—1. That it does not substantially conform to the requirement of the Penal Code of the territory; and 2. That the facts stated therein do not constitute a public offense; and the refusal of the lower court to sustain the demurrer is complained of as error.

The statute requires every indictment to contain a statement of the acts constituting the offense in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended. Pen. Code, par. 1457. It must also be direct and certain as regards (1) the party charged, (2) the offense charged, and (3) the particular circumstances of the offense charged, when they are necessary to constitute a complete offense. Pen. Code, par. 1459. The statute further provides that no indictment is insufficient, nor can the trial, judgment, or other proceeding

thereon be affected, by reason of any defect or imperfection in matter of form which does not tend to the prejudice of a substantial right of the defendant upon its merits. Pen. Code, par. 1467. Tested by these requirements, is the indictment sufficient in form, and do the facts stated constitute a public offense? Paragraph 1574 of the Revised Statutes makes it the duty of the treasurer of each county: "First. To receive and to hold, as a special fund, all public school moneys, whether received by him from the territorial treasurer, or raised by the county for the benefit of public schools, or from any other source, and to keep a separate account thereof, and when the same is apportioned among the school districts, to open and keep a separate account of each district. . . . Third. To pay over, on the warrants of the county school superintendents, duly indorsed by the person entitled to receive the same, any or all of said moneys." The warrant set out in the indictment purports to have been drawn in favor of "Wallace W. Wild, or order." It is not alleged to have been indorsed by him to the defendant, or to have contained any indorsement whatever, when presented for payment. By the express provision of the statute, the treasurer was only permitted to pay the money on it when "duly indorsed by the person entitled to receive the same," and, unless so indorsed, he would not have been "authorized to pay the same, if genuine." We are aware that it has been held in forgery cases, upon questions of variance, that the indorsement is no part of the instrument, and need not be set out in an indictment charging the forgery of a note or bill. The question raised here, however, is not one of variance, but as to whether the indictment legally charges the offense (not forgery) defined in paragraph 105 of the Penal Code. There is no authority pleaded or apparent for the payment of this warrant to the defendant. The instrument itself impliedly, but very clearly, says, "Do not pay this money to George Cluff, or to anybody but Wallace W. Wild, or his indorsee," and in the hands of the defendant without indorsement it is plainly an inadequate instrument for the violation of the statute cited. We hold that it would not have been possible for the defendant to defraud the county by means of the warrant as pleaded, that in law this impossibility must be taken as disproving any alleged intent to defraud, that the

indictment does not state facts sufficient to constitute a public offense, and that the lower court erred in refusing to sustain the demurrer thereto. We do not deem it necessary to examine into the record further. The judgment is reversed, the case dismissed, and it is ordered that the defendant be discharged.

Street, C. J., Sloan, J., and Doan, J., concur.

[Civil No. 606. Filed February 23, 1898.]

[52 Pac. 471.]

FRANK H. HEREFORD, Plaintiff and Appellant, v.
ELIZABETH A. O'CONNOR, Defendant and Appellee.

1. TAXES AND TAXATION—EVIDENCE—RECITALS IN TAX-DEEDS—LAWS 1893, ACT No. 84, SECS. 20 AND 22, CITED—PRIMA FACIE EVIDENCE—FILING AFFIDAVIT—NOTICE OF INTENTION TO APPLY FOR TAX-DEED—SERVICE ON OWNER.—Recitals in a tax-deed that the plaintiff and grantee has filed with the treasurer an affidavit showing that notice was served upon Katzenstein (the person owing said taxes) as is by law in such cases required, are only *prima facie* evidence, under section 22, *supra*, that an affidavit was filed, but are no evidence of the contents of the affidavit or the notice, or that the notice was served upon the owner of the property, as is required by section 20, *supra*.
2. SAME—TAX-DEEDS—SERVICE OF NOTICE OF INTENTION TO APPLY FOR—MUST BE ON OWNER.—The person to whom land is taxed is not the proper person upon whom to serve notice of intention to apply for a tax-deed when the statute requires it to be served upon the owner of the land.
3. SAME—EVIDENCE—RECITALS IN TAX-DEEDS—MUST RECITE SUBSTANCE OF AFFIDAVIT AND NOTICE.—Recitals in a tax-deed, to dispense with supplemental evidence, that notice had been served, should recite the substance of the affidavit, and the affidavit should show the contents of the notice.
4. SAME—TAX-DEEDS—JUDGMENT—AGAINST HOLDER—FAILURE TO ADJUDGE REFUND OF MONEY PAID—LAWS 1893, ACT No. 84, SEC. 26, CONSTRUED—APPEAL AND ERROR—MODIFICATION.—Where the judgment in favor of a successful claimant of land sold under tax-deed

fails to provide for payment to the holder of the tax-deed of the moneys expended by him, as provided in section 26, *supra*, it will on appeal, if there is no other error, be modified to that extent.

5. WITNESSES—FEES—MORTGAGE—REV. STATS. ARIZ. 1887, PAR. 1982, CONSTRUED—VOLUNTARY WITNESSES—SUBPENA—DUTY TO ATTEND OUTSIDE COUNTY.—The fee-bill for attendance and mileage of witnesses, paragraph, 1982, *supra*, applies only to witnesses who come in response to subpoena. Witnesses served without the county are not required to attend beyond the limits of the county where they reside, nor to obey a subpoena for attendance outside of their own county, and in attending court out of their own county their attendance is voluntary, and they are not entitled either to *per diem* or mileage.
6. SAME — SAME — SAME — PARTY — HUSBAND OR WIFE — COMMUNITY PROPERTY.—A party to a suit is not entitled to witness-fees, nor is a husband or wife entitled to fees while attending court as a witness for each other as parties in a suit involving the property of either not shown to be other than community property.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. J. D. Bethune, Judge. Modified.

The facts are stated in the opinion.

Frank H. Hereford, *in persona*.

"Admissions, whether of law or fact, which have been acted upon by others, are conclusive against the party making them." Herman on Estoppel and Res Judicata, pars. 764, 862, 732.

Katzenstein and those claiming under him had a right to redeem the property until notice was served and a deed applied for. There their right and interest ceased. The equitable title then vested in the purchaser. Nothing further could thereafter be done by the delinquent taxpayer. The law takes the right of further action from him and vests it in the treasurer, who, upon a proper showing, makes the transfer of the legal title. The question, under our statutes, of defects or irregularities in the affidavit is only material to the treasurer, to protect him in case the service of notice has not in fact been properly made. It is for the courts, and not for him, to try the question of service. But he would be held responsible for the issuance of the deed without a *prima facie*

showing. *Southworth v. Edmunds*, 152 Mass. 203, 25 N. E. 106, 9 L. R. A. 118.

"Still it is held that if a tax-deed is issued to the purchaser, although he omitted to give the proper notice, the deed is not absolutely void, but merely voidable. It will convey the title to the purchaser, but the title is not in the same condition as if the notice had been given. The purchaser now holds it subject to be defeated by subsequent redemption by the owner." Black on Tax Titles, par. 329; *Bowers v. Hallock*, 71 Iowa, 218, 32 N. W. 268; *Knudson v. Litchfield*, 87 Iowa, 111, 54 N. W. 199.

Plaintiff has sufficient title to institute this suit and obtain judgment, while the defendant has no title, according to her own evidence; for the evidence given on her side of the case shows that Katzenstein purchased at a tax-sale, with her knowledge and consent, all her title, and held it in trust for her husband, who is not a party to this suit; and that not only has her time for redemption expired, but that a deed was issued to Katzenstein. And again, defendant's defense tenders no issue on redemption.

In rendering judgment the court did not grant defendant's prayer for relief, confirming to her the contested one half of the mine. The decree was, that the deed was void and for costs, leaving the significant question as to who was the real owner of the one half in a more unsettled state than ever. Under the law the plaintiff should have had judgment, at least for taxes, penalties, and costs. Laws 1893, Act 84, sec. 26, p. 132.

"Costs are recovered in law only by force of statutes, and depend upon the terms of the statute strictly construed."

A witness attending court, and coming from beyond the jurisdiction of the court, is not entitled to fees. "And no litigant has the right to bring witnesses from beyond the limits allowed by the statutes, and by this means subject his adversary to the payment of an unnecessarily heavy bill of costs, though the witnesses themselves may be willing to attend the court." *Sapp v. King*, 66 Tex. 570, 1 S. W. 466; *Mylius v. St. Louis F. S. and W. R. Co.*, 31 Kan. 232, 1 Pac. 619; *Sherman v. People*, 4 Kan. 570; *Fish v. Farwell*, 33 Ill. App. 242; *Stern v. Herren*, 101 N. C. 516, 8 S. E. 221; *Wooster v. Hill*, 44 Fed. 819; *Roundtree v. Renebut*, 71 Fed. 255.

"A husband managing and conducting a suit for his wife is not entitled to witness fees, although he testifies in the case." *Freck v. Barclay*, 5 Pa. Dist. 587.

"One actually, if not nominally, a party in interest is not entitled to witness fees." *Leonard v. Smith*, 4 Pa. Dist. R. 249.

"The wife of a party to an action is not entitled to witness fees," the fees being community property. *Cole v. Angel*, (Tex. Civ. App.) 28 S. W. 93.

Barnes & Martin, for Appellee.

Plaintiff purchased tax-certificates on an undivided one half of the property in question in 1894 for the taxes of 1893. His tax-deed is for the one half, and is of date October 9, 1896. This is his only title.

The deed must conform to section 20 of Act No. 84, Laws of 1893. That law provides that before a purchaser shall be entitled to a tax-deed, he must, thirty days before he applies for a deed, serve upon the owner of the property purchased, or upon the person occupying the property, if said property is occupied, a written notice thereof, and the owner shall have the right to redeem the same before deed issues.

This is the basis of the right to the deed. It is a substantial right of the owner of the property, and cannot be dispensed with. Without that notice a deed may not issue, and is void if it issues. It is void, as a judgment would be without service of summons. It is jurisdictional. It is mandatory. *Cooley on Taxation*, 335, 339.

That is not all. That there may be no doubt about it, and that the evidence of the service may be preserved, the statutes (Laws 1893, Act 84, sec. 20) says: "And no deed of the property sold at a delinquent tax-sale shall be issued by the tax-collector, or any other officer, to the purchaser of such property, until after such purchaser shall have filed with such tax-collector an affidavit showing that the notice heretofore required to be given has been given as herein required, which said affidavit shall be filed and preserved by the tax-collector," etc.

The making of the affidavit showing notice and filing of the same are equally mandatory. The findings of the court and the evidence show that there never was any affidavit filed.

Miller v. Miller, 96 Cal. 376, 31 Am. St. Rep. 229, 31 Pac. 247; *Reed v. Lyon*, 96 Cal. 501, 31 Pac. 619; *Holbrook v. Fellows*, 38 Ill. 440; *Wilson v. McKenna*, 52 Ill. 43.

"Statutes provide sometimes for an affidavit of service to be filed with the officer whose duty it is to execute the tax-deed. Such affidavit is then a prerequisite to the validity of the tax-deed." *American Miss. Soc. v. Smith*, 59 Iowa, 704, 13 N. W. 849; *Ellsworth v. Cordrey*, 63 Iowa, 675, 16 N. W. 211; *Smith v. Heath*, 80 Iowa, 231, 45 N. W. 768; *Wisner v. Chamberlain*, 117 Ill. 568, 7 N. E. 68; *Davis v. Gosnell*, 113 Ill. 121; *Gage v. Hervey*, 111 Ill. 305; *Gage v. Mayer*, 117 Ill. 632, 7 N. E. 97; *Lockwood v. Gehlert*, 53 Hun, 15, 6 N. Y. Supp. 20.

STREET, C. J.—1. This was an action brought by Frank H. Hereford, appellant herein, and plaintiff in the district court, against E. A. O'Connor, appellee, to quiet title to an undivided one-half interest in the Empire Mine, located in Patagonia Mining District, Pima County, Arizona. The Empire Mine is a patented mine, letters patent having been issued therefor, bearing date February 17, 1877, and has been assessed for taxes since that date. Taxes, without dispute, had been paid thereon for the years 1883, 1885, 1887, 1888, 1889, and 1890, as well as for other years, while the taxes for some other years had been allowed to go delinquent, and at times unpaid. Plaintiff claimed through and by virtue of a tax-deed from the county treasurer and *ex officio* tax-collector of Pima County, dated the ninth day of October, 1896, for the consideration of \$19.78, upon a sale of an undivided one-half interest in said mine, on the twelfth day of April, 1894, for taxes assessed for the year 1893. The findings of fact and conclusions of law made by the trial court are as follows:—

"First. That plaintiff bases his cause of action on the tax-deed introduced in evidence, said deed having been issued by the tax-collector of Pima County, Arizona, to plaintiff, Frank H. Hereford, on the ninth day of October, 1896, for the property described in the complaint. Second. That notice of intention to apply for a deed, required to be given under section 20 of Act No. 84 of Session Laws of Arizona for 1893, introduced in evidence by plaintiff, did not and does not show service of said notice as required by said section, in that no

affidavit of service of said notice was made and filed with the tax-collector before the issuance of the deed aforesaid by the tax-collector to plaintiff as required by law.

"As a conclusion of law from the foregoing facts the court finds that the deed issued by the tax-collector to plaintiff for the property described in the complaint was issued without authority of law, and is void."

2. Session Laws 1893. (Act No. 84, secs. 21, 22) provide:—

"Sec. 21. The matters recited in the certificate of sale must be recited in the deed, and such deed, duly acknowledged or proved, is conclusive evidence that: (1) The property was assessed as required by law. (2) The property was equalized as required by law. (3) The taxes were levied in accordance with law. (4) At a proper time and place the property was sold as prescribed by law, and by the proper officer. (5) The person who executed the deed was the proper officer.

"Sec. 22. Such deed, duly acknowledged or proved, is (except against actual fraud) *prima facie* evidence of all other facts therein stated, and of the regularity of all other proceedings from the assessment by the assessor up to the execution of the deed."

Plaintiff, under this law, had purchased the undivided one-half interest in the Empire Mine, for which he asked the title to be quieted, and the only evidence which he introduced of his title to such mine was said tax-deed. Among the other recitations in the deed was the following: "Whereas, the said Frank H. Hereford, the owner and holder of said certificate of sale, has filed with said party of the first part, as treasurer and *ex officio* tax-collector, as aforesaid, an affidavit showing that the notice was served upon the said Samuel Katzenstein (the person owing said taxes) on the twenty-ninth day of May, 1896, as by law in such cases required, that the said owner and holder of said certificate of sale would apply for a deed to the property so sold and purchased as aforesaid; and . . ."—which was the only evidence the plaintiff introduced to show that the notice had been served, and the affidavit filed with the tax-collector, before the issuing of the deed. Section 20 of said act provides that, if the property is not redeemed from sale, the purchaser shall have a deed reciting substantially the matters contained in the certificate; and that the purchaser, thirty days before he applies for a deed,

shall serve upon the owner or person occupying the property "a written notice, stating that said property, or a portion thereof, has been sold for delinquent taxes, giving the date of sale, the amount of property sold, the amount for which it is sold, the amount then due and the time when the right of redemption will expire and when the purchaser will apply for a deed." And it further provides: "And no deed of the property sold at a delinquent tax sale shall be issued by the tax-collector, or any other officer, to the purchaser of such property, until after such purchaser shall have filed with such tax-collector or other officer, an affidavit showing that the notice hereinbefore required to be given has been given as herein required, which said affidavit shall be filed and preserved by the tax-collector as other files, papers, and records kept by him in his office." It will be observed that the matters of which the deed is conclusive evidence pertain to official acts of the assessor, treasurer, and tax-collector, while other matters recited in the deed, and which may be non-official, are shown but *prima facie* by the deed. Such matters may be rebutted, and shown not to exist, or to exist differently from the recital. The act of giving notice is non-official. It is the act of the purchaser who may be interested in giving an indifferent or ineffective notice, and making the affidavit thereof in a way to mislead. The effect of these recitals is statutory, and derived from the statute. Without the aid of statute, a tax-deed would be but a link in the title, and would have to depend upon evidence of anterior proceedings. With those statutory provisions, evidence of anterior proceedings is dispensed with, and the deed is proof conclusive of such anterior proceedings as the statute makes conclusive, and *prima facie* of all other facts in the deed stated. Blackwell on Tax Titles, sec. 845, says: "This deed, according to the principles of common law, is simply a link in the chain of the grantee's title. It does not, *ipso facto*, transfer the title of the owner as in grants from the government, or in deeds between man and man. The operative character of it depends upon the regularity of the anterior proceedings. The deed is not the title itself, nor even evidence of it. Its recitals bind no one. It creates no estoppel upon the former owner. No presumption arises, upon the mere production of the deed, that the facts upon which it is based had any existence."

Cooley on Taxation (p. 536), in speaking of the conditions imposed upon the purchaser, says: "Whatever the statute may make provision for, subsequent to the sale, in order to the protection of the interest of parties having the right to redeem, must be strictly performed. The reasons which require this are the same that render imperative a strict compliance with all those provisions which are to be observed in the interest of the taxpayer before the sale is made." Black on Tax Titles (par. 345), under the head of "Proof of Notice," says: "The burden rests upon a party asserting a title in fee by virtue of the tax certificate to prove that the notice of the time for redemption has been duly served." And in the same section, in regard to the presumptions of the facts stated in the tax-deed, he further says: "If the statute makes the tax-deed *prima facie* evidence of the regularity of all proceedings prior to its execution, it will be presumed, in the absence of a showing to the contrary, that the redemption notice was duly served upon the proper person; and this presumption, when supplemented by positive testimony showing that an affidavit making due proof of service by publication was properly filed, cannot, in the absence of contradictory evidence, be overthrown by the mere fact that the affidavit cannot be found in the proper custody, and that no record thereof was made by the treasurer, as required by the statute." And he supports this statement by citing the case of *Soukop v. Investment Co.*, 84 Iowa, 448, 35 Am. St. Rep. 317, 51 N. W. 167, and *Baker v. Crabb*, 73 Iowa, 412, 35 N. W. 484, in both of which cases supplemental evidence was given of the contents of the affidavit and the contents of the notice, which seems to make it clear that the recital in the deed to Hereford was only *prima facie* evidence that an affidavit had been filed, and was no evidence of the contents of the affidavit or the notice; and, in order to have made evidence sufficient for the court to have determined that the owner did receive notice, supplemental evidence of the fact would have been necessary in addition to the recital. By referring to the recital in the deed, it will be observed that notice was given to Samuel Katzenstein, who owed the taxes, and it was nowhere stated in any recital that notice had been served upon the owner.

The record does not disclose the fact that Samuel Katzen-

stein was the owner. It only discloses the fact that at one time he had bought the interest claimed by Hereford at a tax-sale, without there being any proof that he had acquired the title under that sale. Black, in his Tax Titles (pars. 338 and 339), in treating of persons entitled to notice, treats separately the statutes which require in the one instance the owner of the land to be served with the notice, and in the other instance the person to whom the land is taxed; and clearly shows that the person to whom the land is taxed is not the proper person upon whom to serve notice when the statute requires it to be served upon the owner of the land. Section 20 of act 84, Laws 1893, requires the notice to be served upon the owner of the property purchased, or upon the person occupying the property, if said property is occupied. It requires the notice to be in writing, stating that the property has been sold for delinquent taxes, giving the date of the sale, and the amount of the property sold, the amount for which it is sold, the amount then due, the time when the right of redemption will expire, and when the purchaser will apply for a deed. It also provides that an affidavit shall be filed showing that such notice has been given as is required. A recital in the deed which merely states that an affidavit has been filed, without showing what the affidavit contained, would not be such a recital as would be *prima facie* evidence of any fact except the filing. To become such evidence as to dispense with supplemental evidence, the recital should comprise fully and clearly the contents of the notice. If the deed recited the substance of the affidavit, and the affidavit showed the contents of the notice, it then might be said that the recital was *prima facie* evidence that notice had been served; but a bare statement in the deed, such as was contained in the deed to Hereford, is not *prima facie* evidence of the notice and affidavit, and supplemental evidence thereof is required. For these reasons, we see no error in the findings of fact and conclusions of law made by the district court.

3. Section 26 of said act provides: "If the holder of a tax-deed, or any one claiming under him by virtue of such tax-deed, be defeated in any action by or against him for the recovery of the land sold or the possession thereof, the successful claimant shall be adjudged to pay to the holder of the tax-deed or the party claiming under him by virtue of

such deed, before such claimant shall be let into possession, the full amount of all money paid by the holder of said deed for the same, with all penalties and costs as allowed by law, including the costs of such deed, and the recording of the same, with interest at the rate of twenty per cent per annum on such amounts." This the district court, in its judgment, failed to do, and for that reason, and to that extent, the judgment will have to be modified.

4. The defendant, after succeeding in the action, filed a cost-bill, in which was included for witness fees to Stephen O'Connor, and mileage from his residence at Ringgold, state of Texas, 1,168 miles, at thirty cents per mile, and ten days' attendance upon court with the *per diem* of two dollars per day; making in all \$370.40. Paragraph 1982 of the Revised Statutes of Arizona provides for witness fees as follows, to wit: "For attending to any civil suit or proceeding, for each day \$2.00. Mileage counted from the residence of the witness—to be computed one way only—for each mile 30c." This fee-bill applies only to witnesses who come in response to a subpoena. Witnesses served without the county are not required to attend beyond the limits of the county where they reside, and a witness is not bound to obey a subpoena for his attendance outside of his own county. If he does attend court upon the trial of any cause out of his own county, his attendance is voluntary, and he is not entitled either to *per diem* or mileage. He can only be entitled to his *per diem* when attending court in obedience to one of its writs. It further appears from the record that O'Connor was the husband of the defendant, E. O. O'Connor, and was there as a witness in his wife's interest in property not shown by the record to have been other than community property. A party to a suit is not entitled to witness fees, nor is a husband or wife entitled to fees while attending court as a witness for each other as parties. Paragraph 2102 of the Revised Statutes of Arizona: "All property acquired by either husband or wife during the marriage," with certain exceptions therein named, "shall be deemed the common property of the husband and wife." *Cole v. Angel*, (Tex. Civ. App.) 28 S. W. 93. Fees allowed to either while acting as a witness for the other, when a party to the suit, would, in legal effect, be allowing witness fees to the party. Therefore, the cost bill filed by the defendant will

be retaxed, and the item of \$370.40 stricken therefrom. Wherefore it is ordered that the district court so modify its judgment as to allow plaintiff, Hereford, the amount of money paid by him for the tax-deed, including the recording of the same, with interest at the rate of twenty per cent per annum upon such amount, and that the item of \$370.40 be stricken from the defendant's cost-bill. In other particulars the judgment stands affirmed.

Sloan, J., Davis, J., and Doan, J., concur.

[Civil No. 578. Filed February 23, 1898.]

[52 Pac. 367.]

WILLIAM M. BILLUPS et al., Plaintiffs in Error, v. B. N. FREEMAN et al., Defendants in Error.

1. PRACTICE—ERROR CORAM NOBIS OBSOLETE—REMEDY BY MOTION.—The writ of error *coram nobis* has become obsolete, having been superseded by the modern practice of applying to the court by motion for the relief sought.
2. ABATEMENT AND REVIVAL—CLAIM AND DELIVERY—DEATH OF PARTY PENDING APPEAL AND JUDGMENT—SURVIVAL—REV. STATS. ARIZ. 1887, PARS. 946, 1185, CITED.—The death of a defendant occurring after judgment in the court below, and pending an appeal, and prior to the affirmation of such judgment, does not affect the validity of the latter judgment, unless the nature of the action is such that it does not survive in favor of or against the legal representatives of the deceased person. Paragraph 946, *supra*, cited. The action of claim and delivery survives, and therefore the death of a defendant therein pending appeal and prior to affirmation of judgment does not affect such judgment. Paragraph 1185, *supra*, cited.
3. APPEAL AND ERROR—CLAIM AND DELIVERY—ELECTION TO TAKE VALUE OF PROPERTY—JUDGMENT FOR MONEY MERELY—AFFIRMATION—JUDGMENT IN SUPREME COURT FOR AMOUNT AND COSTS—STAY AND APPEAL BOND—AGAINST SURETIES—REV. STATS. ARIZ. 1887, PAR. 950, CITED.—Upon an appeal from a judgment in an action of claim and delivery for the return of the property, or that defendant and his sureties upon his bond pay the value of the property, the plaintiffs having, under the statute, elected to take the value of the property, the judgment thereupon became one for money merely. The bond upon appeal being both an appeal and a stay bond, it

was proper upon the affirmation of the judgment of the trial court to render judgment in this court upon this bond for the amount of the judgment of the court below and the costs of suit against the defendants and sureties upon the bond, such judgment being provided for by paragraph 950, *supra*, and conforming to the practice of this court.

APPLICATION for a Writ of Error Coram Nobis. Dismissed.

A. J. Daggs, for Plaintiffs in Error.

The supreme court of Arizona possesses chancery as well as common-law jurisdiction, and also jurisdiction according to the course of common law of England. Organic Act Arizona, sec. 1868; Rev. Stats. secs. 594, 2935; *Teller v. Wetherell*, 6 Mich. 45.

A writ of error *coram nobis* is a common-law writ. *Smith v. Kingsley*, 19 Wend. 620; Tidd on Practice, 1070; *Crawford v. Williams*, 1 Swan, (Tenn.) 341.

It is a writ of right, common-law right, independent of statute. *Jones v. Williams*, 44 Miss. 47.

And the writ issues from the same court to correct an error of fact latent in the proceedings, judgment, or default of clerks. *Philip v. Russell*, 19 Fed. 523.

It is possibly the only remedy to correct an erroneous judgment where a party died before rendition. *Dugan v. Scott*, 37 Mo. App. 669.

Where the fact must be shown *aliunde*, it must be brought by writ of error *coram nobis*. Freeman on Judgments, 153.

The action of replevin and claim and delivery are analogous. *De Thomas v. Wetherby*, 61 Cal. 92, 44 Am. Rep. 549.

The provision of our statute providing for the survival of actions in our supreme court (par. 946) contains the following provision: "Provided, however, that this shall not apply to any suit or action in which the cause of action does not survive in favor of or against the legal representative of a deceased person."

The said Goodman having died prior to the rendition of judgment in the supreme court, and being the sole defendant, and this being an action of replevin and *ex delicto*, does the action survive against his legal representatives or does it abate forever?

There is but one statute pointing out an action *ex delicto* that survives. Rev. Stats., par. 2145.

All other actions survive by the common law. Rev. Stats., par. 2935.

"Replevin is among the earliest remedies given by the common law; as far back as we have any written history, we find replevin spoken of." Cobbey on Replevin, 1. Its first appearance as part of the *lex scripta* is in the statute of Marlebridge, 52 Henry III, about A. D. 1267. By these citations it is observed that the action of replevin is one of the actions belonging to the common law of England and defined to be "a personal action *ex delicto* brought to recover goods unlawfully taken or detained." This is the same as our action of claim and delivery.

Replevin being an action at common law, all actions abated at the death of either plaintiff or defendant and did not survive. *Green v. Watkins*, 6 Wheat. 260.

The death of the defendant abates the action, and it cannot be revived against his administrator. Cobbey on Replevin, 425; citing *Merrit v. Lambert*, 8 Me. 128; *Rector v. Chevalier*, 1 Mo. 345; *Mellen v. Baldwin*, 4 Mass. 480; *Miller v. Langton*, 1 Harp. (S. C.) 131; *Burkle v. Luce*, 1 N. Y. 163.

By the common law of England a judgment against a dead person is absolutely void. *Carter v. Carriger*, 3 Yerg. 411, 24 Am. Dec. 585; *Geroult v. Anderson*, 1 Walker, 30, 12 Am. Dec. 521.

Following this, when a sole defendant dies, the bondsmen are relieved from all liability and responsibility. Their contract is at an end with the death of their principal, the sole defendant in replevin. *Badlam v. Tucker*, 1 Pick. 389, 11 Am. Dec. 202; *Sheldon v. Quinlen*, 5 Hill, 441.

Joseph Campbell, for Defendants in Error.

It is questionable whether this case can be brought back before this court by this ancient, hoary, obsolete writ of *coram nobis*.

"It is now fallen into practical desuetude." Black on Judgments, sec. 300.

But if it can, the writ does not lie to correct matters of law, nor is it intended to authorize any court to review or revise its opinions, nor correct any error in the judgment of the

court, nor to put in issue any fact directly passed upon or affirmed by the judgment itself. Freeman on Judgments, sec. 94; Black on Judgments, sec. 300; *Bingham v. Brewer*, 4 Sneed, 433.

The office of the writ is to bring to the attention of the court, and obtain relief from, errors of fact, such as the death of either party pending the suit and *before* judgment. *Kemp v. Cook*, 18 Md. 130, 79 Am. Dec. 681.

The error of fact sought to be reached by this writ is, that Goodman having died on the sixteenth day of February, 1897, this court on the twenty-sixth day of February, 1897, erred in affirming the judgment of the lower court that had been rendered in his lifetime, in June, 1896, for the reason that the action, being for the recovery of personal property or its value, is abated by the death of the defendant.

Replevin does not abate at the death of one of the parties. Cobbey on Replevin, secs. 800, 801.

"It would be contrary to every principle of justice and every rule of public policy" to hold that the action of replevin abated at the death of the defendant. *Keite v. Boyd*, 16 Serg. & R. 300.

But our statute (Rev. Stats. 1185) provides that this character of action shall not abate.

"A final judgment or decree establishing a cause of action does survive, notwithstanding the cause of action would not have survived if not reduced to final judgment." *Kelly v. Kelly*, 137 Ind. 690, 37 N. E. 545; *Beck v. Dowell*, 40 Mo. App. 71; *Kimborough v. Mitchell*, 1 Head, 540; *Lewis v. St. Louis R. R. Co.*, 59 Mo. 495, 21 Am. Rep. 385; *Carr v. Rischer*, 119 N. Y. 117, 23 N. E. 296.

"When in *any* suit either party shall die between verdict and judgment, the judgment shall be entered as if both parties were living." Rev. Stats. 732; *Gibbs v. Belcher*, 30 Tex. 79; *Brooke v. Clarke*, 57 Tex. 105; *Pullman Car Co. v. Fowler*, (Tex. Civ. App.) 27 S. W. 268.

SLOAN, J.—This is an application for a writ of error *coram nobis*, brought to obtain a review of a judgment entered by this court on the 26th of February, 1897, affirming upon a short transcript a judgment of the district court of Coconino County in the case of B. N. Freeman, J. H. Hoskins,

Jr., and F. M. Kimball, copartners under the firm name and style of the "Arizona Central Bank," plaintiffs, against S. Goodman, defendant, and R. E. Daggs, intervener, and entering a judgment in this court against said defendant and his sureties upon his appeal bond, William M. Billups, R. E. Daggs, A. J. Daggs, and the London Company.

The office of the ancient remedy of a writ of error *coram nobis* was to have a judgment corrected by an examination, by the court rendering it, into some question of fact affecting the validity and regularity of the proceedings, such as the death of one of the parties before verdict or judgment, or the infancy, insanity, or coverture of the defendant, and which was not made an issue and determined in the action. No error of a court in applying the law to the facts could be rectified by means of the writ, nor could any error of fact which was adjudicated in the action be reviewed. *Kemp v. Cook*, 18 Md. 130, 79 Am. Dec. 681. The writ has become obsolete, having been superseded by the modern practice of applying to the court by motion for the relief sought. *Pickett v. Legerwood*, 7 Pet. 144; *Association v. Fassett*, 102 Ill. 315. We are not disposed to encourage the digging into the moldering dust-heaps of the past for worn-out and discarded remedies, or to sanction in the future the practice of applying to this court in this manner for relief, which can more speedily and as efficaciously be had by the simple remedy of motion. We have, however, in the present instance, chosen to consider the application for the writ as though it was a motion to vacate the judgment, upon those facts which could have been reviewable under the writ of *coram nobis*.

The principal question presented is, in brief, whether the death of a defendant in an action brought under our claim and delivery statutes for the possession of personal property, occurring after judgment in the court below, and pending an appeal and prior to the affirmation of such judgment by this court, affects the regularity and validity of the latter judgment. Paragraph 946 of the Revised Statutes provides that "946 (sec. 298) If any party to the record, in any cause now pending in or hereafter taken to the supreme court, by appeal or writ of error, shall have died heretofore, or shall hereafter die, after the appeal or writ of error bond has been filed and approved, or after the writ of error has been served and

before such cause has been decided by the supreme court, such cause shall not abate by such death, but the court shall proceed to adjudicate such cause, and render judgment therein as if all the parties thereto were still living, and such judgment shall have the same force and effect as if rendered in the lifetime of all the parties thereto; provided, however, that this act shall not apply to any suit or action in which the cause of action does not survive in favor of or against the legal representatives of a deceased person." Under the provisions of this section it becomes important, therefore, to determine whether an action in claim and delivery survives in favor of or against the legal representative of a deceased person. This question is answered in the affirmative by paragraph 1185 of the Revised Statutes, which reads as follows: "1185 (sec. 221). Actions for the recovery of any property, real or personal, or for the possession thereof, and all actions founded upon contracts, may be maintained by and against executors and administrators, in all cases in which the same might have been maintained by or against their respective testators or intestates."

Another question is also sought to be presented for our review in this application, which we will briefly consider. The judgment of the court below was for the plaintiffs in the action, for the return of the property sued for, or that the defendant and his sureties upon his bond for the return of the property pay the assessed value of the property, at the election of the plaintiffs. The latter, under the statute, elected to take the value of the property, and the judgment thereupon became one for money merely. The bond upon the appeal was both an appeal and a stay bond, and upon the affirmation of the judgment in this court judgment was rendered upon this bond for the amount of the judgment of the court below and the costs of this suit, against the defendants and the sureties upon the bond. Such a judgment is provided for by paragraph 950 of the Revised Statutes and conforms to the practice of this court. The contention that the *remititur* was issued while a motion for rehearing was pending and undetermined is not borne out by the minutes of the court. The application for the writ will be dismissed, with costs.

Street, C. J., Davis, J., and Doan, J., concur.

[Civil No. 582. Filed February 23, 1898.]

[52 Pac. 364.]

JANE G. LATIMER, Defendant and Appellant, v. JOSEPH H. HAMILL, Administrator of the Estate of Frank D. Johnson, Deceased, Plaintiff and Appellee.

1. PLEADING—DEMURRER—SEPARATE ANSWERS—JUDGMENT ON PLEADING.

—In an action of ejectment it is error for the trial court, upon sustaining a demurrer to a separate defense of an answer, to grant a motion by plaintiff for judgment on the pleadings, where there still remains a plea of "not guilty" and a plea of the statute of limitations.

2. SAME—ANSWER—SUFFICIENCY—REAL PROPERTY—ORAL EXECUTORY

CONTRACT TO CONVEY LAND PARTLY EXECUTED—STATUTE OF FRAUDS—POSSESSION—IMPROVEMENTS.—An answer to a complaint in ejectment states facts sufficient to constitute a good defense where it alleges a part performance of an oral executory contract for a deed to the land described, taking it out of the statute of frauds, and that the party making the defense has been in the notorious and exclusive possession of the property under the contract, and in pursuance of the same has made lasting and valuable improvements thereon.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Gila. Owen T. Rouse, Judge. Reversed.

The facts are stated in the opinion.

Edwards & Stoneman, for Appellant.

The plea of not guilty was only an admission that the defendant was in possession of the premises sued for, and puts the plaintiff upon proof of every other material allegation not otherwise specially admitted in the answer. Rev. Stats., par. 3143.

A plea of not guilty is not subject to a demurrer any more than a general denial to a complaint in a suit upon an open account.

An equitable title of such character as entitles a holder to possession is a defense to an action brought by the holder of the legal title. *Hyde v. Mangan*, 88 Cal. 319, at 325, 26 Pac.

180; *Hicks v. Lovell*, 64 Cal. 17, 49 Am. Rep. 679, 27 Pac. 942; *Whittier v. Stegge*, 61 Cal. 238.

A vendee in possession under an executory contract the conditions of which have been by him fully performed has an equitable title and a good defense against the legal title in a suit of ejectment. *Helm v. Wilson*, 76 Cal. 476, 18 Pac. 604; *Talbert v. Singleton*, 42 Cal. 390.

Permanent improvements made in good faith, under a parol contract to convey land, is a good defense to an action of ejectment. *Hardesty v. Richardson*, 44 Md. 617, 22 Am. Rep. 62; *Mackall v. Mackall*, 135 U. S. 167, 10 Sup. Ct. 705; *Neal v. Neal*, 76 U. S. 12.

Peter R. Robertson, for Appellee.

In this case there was no prejudicial error, unless appellant's alleged equitable estate was a valid defense to the action.

The verbal contract set up by appellant is within the statute of frauds. Rev. Stats., secs. 1865, 2030.

To enable defendant to successfully set up a contract to defeat the action, the contract set up must be such as she could have enforced against the deceased (*Adams on Equity*, 8th ed., 22), and as the alleged contract set up in her answer herein is void, as being within the statute of frauds, and not such a contract as she could have enforced against the deceased (*May v. Sloan*, 101 U. S. 231), she cannot enforce it against the administrator.

SLOAN, J.—Appellee, Joseph H. Hamill, in his character as administrator of the estate of Frank D. Johnson, deceased, sued the appellant in ejectment for the possession of lots 12 and 19, in block 79, in the town of Globe. The complaint was in the usual form. A default was taken against appellant, which was subsequently set aside on her motion, and leave granted her to answer the complaint. A demurrer to her original answer having been sustained, by leave of the court appellant filed an amended answer. This amended answer contained a number of defenses to the action,—the first being the plea of “not guilty”; the second set up the plea of the statute of limitations; and the third, stripped of its unnecessary verbiage, in substance set up the following facts: That

about the first day of January, 1888, appellant and Frank D. Johnson, deceased, made and entered into an executory contract, under the terms of which it was mutually agreed that the said Johnson would convey to the appellant, by good and sufficient deed, part of the premises described in said complaint,—to wit, lot No. 19,—upon the performance by the appellant of certain conditions,—to wit, that the appellant should cause to be made and placed upon said premises permanent, valuable, and lasting improvements, consisting of a suitable dwelling-house for her and her two children to reside in, and, in addition thereto, to cause to be sunk and made thereon a well containing permanent water for domestic and other purposes, and that the appellant should repair and add to a certain one-room adobe house other rooms, together with good and sufficient roof thereon, and keep said improvements in repair; that thereupon said Johnson would, in consideration of the making and placing upon said property the improvements aforesaid, execute and deliver to the appellant a good and sufficient deed to such property; that the appellant, relying upon said contract and promises so made as aforesaid by the said Frank D. Johnson, deceased, and in pursuance thereof, erected and placed upon said lot, during the lifetime of said Johnson, valuable and lasting improvements, consisting of a dwelling-house of two rooms, in addition to the one-room adobe house hereinbefore mentioned, and caused to be added to said two rooms, and also to the one-room adobe house aforesaid, a good and sufficient roof thereon, at an expense of \$278; that she, in addition thereto, caused to be sunk and made on said property, at an expense of \$153, a good well, containing water sufficient for domestic and other purposes; that the improvements so made as aforesaid were and are a just and adequate consideration for the conveyance to her of said premises by said Frank D. Johnson, deceased, and that she has never been reimbursed on account of the same; that at the time appellant took possession of said lot No. 19 there were no improvements upon the same, save and except a partly-erected adobe house, not to exceed in value the sum of ten dollars, and that whatever value it now has is on account of the improvements made and put upon the same as aforesaid by the appellant; that ever since the date of said contract appellant has been, and now is, in the open, notorious, and

exclusive possession and occupancy of said lot No. 19, having made valuable and lasting improvements thereon as aforesaid, and claiming to own the same under said contract; that said Frank D. Johnson, deceased, during his lifetime, had repeatedly stated to appellant and to other persons that he intended to convey to appellant the said lot by good and sufficient deed, and well knew of the improvements put upon the said property by appellant as aforesaid at the time the same were placed thereon, and acquiesced in the same, and advised the same, and they were recognized by him as a full performance on the part of the appellant of the contract so made as aforesaid between the deceased and appellant; that, while confined to his deathbed, said Frank D. Johnson, deceased, repeatedly declared in the presence of witnesses his intention to execute and deliver to the appellant a deed of conveyance to said lot, and stated that the appellant was entitled to, and ought to have, a deed to the property aforesaid; and that, in the event he did not so execute and deliver to the appellant a good and sufficient deed to said property, he requested that the property aforesaid should pass to the appellant and become her property in pursuance of the contract so made during his lifetime. A demurrer to the third defense contained in said amended answer was sustained by the court below. Thereupon the appellee moved for judgment upon the pleadings, which motion was granted, and judgment was entered thereupon against appellant for the possession of the property sued for. From this judgment, and the order sustaining appellee's demurrer to the amended answer, appellant brings this appeal.

Even if the demurrer to the third defense set up in appellant's amended answer had been properly taken, no judgment should have been entered upon the pleadings, for the reason that there were still left issues to be tried by the court,—that of the general issue made by the plea of “not guilty,” and that of the plea of the statute of limitations. An examination, however, of the third defense made in the answer discloses that the facts therein stated were sufficient to constitute a good defense to the action, so far as it related to a part of the premises sued for,—to wit, lot 19. A part performance of an executory contract, even though not reduced to writing, is sufficient to take the contract out of the provisions of the

statute of frauds. This is true where the party setting up the defense has been in the notorious and exclusive possession of the property under the contract, and in pursuance of the same has made lasting and valuable improvements thereon which are beneficial to the estate and an expense to the maker. The law upon this question is too well settled to require citations of authority. We hold, therefore, that the court erred in sustaining the demurrer to the third defense in appellant's amended answer, and in awarding judgment upon the pleadings. The cause is reversed, and the court below is directed to overrule the demurrer to appellant's amended answer, and grant a trial upon the merits.

Street, C. J., Doan, J., and Davis, J., concur.

[Civil No. 611. Filed February 23, 1898.]

[52 Pac. 469.]

C. S. McCORMACK et al., Defendants and Appellants, v.
THE ARIZONA CENTRAL BANK, Plaintiff and Appellee.

1. APPEAL AND ERROR—REVIEW—FINDINGS—CONFLICT IN EVIDENCE.—Where the evidence is conflicting upon a point this court will not disturb the findings of the trial court thereon.
2. CONTRACT—CONSIDERATION—PROMISE TO DELIVER NOTE HELD AS COLLATERAL.—Where at the time of the assignment of a note from Nellis to Boyce the bank held the same as collateral security for an existing indebtedness from Nellis to it, a promise made by its cashier to Boyce to deliver up the note, being without consideration, is not enforceable by Boyce.
3. ESTOPPEL IN PARS—PROMISE TO DO SOMETHING IN FUTURE—LOAN ON PROMISE OF THIRD PARTY TO SURRENDER BORROWED NOTE.—The fact that Boyce, in reliance upon the promise of the cashier of a bank to surrender to him a note of Nellis, held by such bank as collateral security, made advances to Nellis, cannot operate to estop the bank from enforcing its rights against such collateral, as an estoppel *in pars* cannot be based upon a mere promise to do something in the future.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Coconino. J. J. Hawkins, Judge. Affirmed.

The facts are stated in the opinion.

Herndon & Norris, for Appellants.

Edward M. Doe, for Appellee.

Appellants seek to invoke an estoppel against the bank because of its cashier's promise to release the note and send it to Boyce, and because of subsequent advances claimed to have been made by Boyce in reliance thereon. But the promise upon the faith of which Boyce it is claimed acted had reference to action in the future. It was but the expression of an intention which Boyce would have no legal right to act upon because circumstances might change and the promisor's mind change with them. Mr. Bigelow says: "The representation or concealment must, in the second place, like a recital in all ordinary cases, have reference to a present or past state of things; for if a party make a representation concerning something in the future, it must be generally a statement of intention or opinion, uncertain to the knowledge of both parties, or it will come to a contract with the peculiar consequences of a contract." Bigelow on Estoppel, 555.

In *Langdon v. Doud*, 10 Allen, 433, the court says: "A person cannot be bound by any rule of morality or good faith not to change his intention, nor can he be precluded from showing such a change merely because he has previously represented that his intentions were once different from those which he eventually executed. . . . The reason [of the doctrine of estoppel] wholly fails when the representation relates only to a present intention of a party, because, being in its nature uncertain and liable to change, it could not properly form a basis or inducement upon which a party could reasonably adopt any fixed and permanent course of action." See, also, *Strong v. Korab*, 65 Iowa, 267; *Allen v. Hodge*, 51 Vt. 393; *Jackson v. Allen*, 120 Mass. 64.

The rule to which appellants invoke the attention of the court in this proposition is clearly inapplicable in this case for the further reason that an estoppel *in pais* cannot be cre-

ated where neither fraud nor injury exist. *Flower v. Elwood*, 66 Ill. 433; *People v. Brown*, 67 Ill. 435.

SLOAN, J.—The appellee, the Arizona Central Bank, brought suit in the court below to foreclose a mortgage upon real estate in Coconino County given by appellants C. S. and Anna McCormack, to secure their promissory note in the sum of \$497, dated December 9, 1892, and due two years after date. This note was made payable to William Nellis or order. The appellant C. E. Boyce was made a party defendant upon the ground, as stated in the complaint, that said Boyce claimed some interest in the note and mortgage sued upon by reason of an attempted assignment of the same by Nellis, the payee of the note, to said Boyce. The defendants in the action, appellants here, in their answer set up that the Arizona Central Bank had no interest in the note and mortgage sued upon at the time of suit, and alleged that the note, shortly after its execution, had been placed with the said Arizona Central Bank by said Nellis to secure an overdraft; that, after the said overdraft had been paid and settled by said Nellis, the note was left with the said bank for safe-keeping, and while so held Nellis sold and transferred the same to appellant Boyce, together with the mortgage, for a valuable consideration, by a duly executed and recorded assignment; and further alleged that, upon the execution of the assignment, Nellis gave Boyce an order in writing upon the Arizona Central Bank to turn over the note to said Boyce; and that thereafter Boyce demanded the note of J. H. Hoskins, cashier of the bank; that upon said demand said Hoskins refused to deliver the note until he could see Nellis, the payee; that thereafter Boyce, in company with said Nellis, visited the bank, when Boyce again demanded the note, and Nellis then instructed Hoskins, the cashier, to deliver it up to Boyce, but that he did not deliver it at that time for the reason that he (said Hoskins) claimed that it had been mislaid, and then and there promised and agreed that he would send the same to Boyce at the town of Williams; and further alleged, upon information and belief, that thereafter the said bank let Nellis have the further sum of one hundred dollars, and thereupon claimed to hold the note as collateral security for the payment of the same, and thereafter refused to deliver up the note unless the said ad-

vance of one hundred dollars, so made by the bank, be paid. The answer further alleged that the note, before the commencement of the suit, had been fully paid by McCormack to the defendant Boyce, and that Boyce, in consideration of such payment, had executed and recorded a cancellation of the mortgage, and that both the note and mortgage were fully satisfied and paid. The case was tried by the court without the aid of a jury, and judgment rendered for the plaintiff in the action foreclosing the mortgage for the amount found due upon the note.

Upon the question as to whether or not, at the time of the attempted assignment of the note and mortgage by Nellis to Boyce, the bank held the note as collateral security for overdrafts of Nellis, there was some conflict of testimony. Hoskins, the cashier, testified that at that time Nellis was indebted to the bank in a sum in excess of two thousand dollars. The evidence upon this point being conflicting, and the trial court having found for the plaintiff, we cannot, of course, disturb this finding. And the case, therefore, so far as any question we are called upon to review is concerned, turns upon whether or not the bank, through Hoskins, its cashier, agreed and promised to deliver up the note to Boyce upon the order of Nellis, and whether, if such promise was made, the bank thereby parted with all interest it may have had in the note, or was thereafter estopped from making claim to the same as collateral security held by it for the overdraft of Nellis. The testimony of the witnesses as to what occurred at the time the demand was made upon Hoskins for the delivery of the note, while somewhat conflicting upon minor details, is substantially that Nellis and Boyce visited the bank, and that Nellis then told Hoskins, the cashier, that he had assigned the note to Boyce, and asked Hoskins to give up the note to Boyce; that Hoskins then said that the note had been misplaced, but that he would look for the same, and would send it to Boyce at Williams at a later time; that upon the following day, or soon after, the bank let Nellis have an advance of one hundred dollars, and charged the same against the note and mortgage as collateral; and that thereafterwards they refused to surrender and give up the note to Boyce. There was some testimony to the effect that, at the time this conversation was had, the bank was about making a shipment of sheep to California,

the property of Nellis, under an arrangement by which the proceeds of the sheep were to be applied in reduction of Nellis's debt to the bank. Hoskins testified that his promise to give up the note was made under the belief that the proceeds of this shipment of sheep would so reduce Nellis's debt that the bank could safely give up the McCormack note to Boyce. He also testified that the bank realized nothing from this shipment by reason of the fact that Boyce, to whom Nellis was also largely indebted, attached the sheep in California, and the bank thereby realized nothing from the shipment, and for that reason the bank retained the note and refused to deliver up the same to Boyce. The testimony also tended to show that Boyce, after the attempted assignment of the note by Nellis, made advances to Nellis, in reliance upon the promise of the bank, through Hoskins, its cashier, to surrender or give up the note. Had it appeared that the bank, at the time Nellis attempted to assign the note and mortgage to Boyce, had no interest in the note, by reason of the fact that the bank did not then hold the same as collateral security for any indebtedness of Nellis to the bank, then it follows that the bank was then the mere bailee of the note for Nellis, and the assignment by Nellis to Boyce vested title to the note and the right of possession in the latter, and the bank could have no right or authority thereafter to make any further advances to Nellis and hold the note as security therefor. But, as we have seen, the court held that at the time of the assignment of the note from Nellis to Boyce, the bank held the same as collateral security for an existing indebtedness, and that the bank was therefore a bailee, with a right in the property and to its possession, which continued until this debt was paid and satisfied. The bank having an interest in the note and a right to its possession, the promise made by Hoskins, the cashier, to deliver up the note to Boyce was without consideration, a mere *nudum pactum*, and could not be enforced. Again, even if it were true, as claimed by Boyce, that he relied upon the promise of Hoskins that he would give up the note, and upon the faith of this promise had made subsequent advances to Nellis upon the note, it could not operate to estop the bank from asserting its right to enforce payment of the same, and to foreclose the mortgage given to secure it. It is well settled that an estoppel *in pais* cannot be based upon a mere promise

to do something in the future, or upon mere statements of intention upon the part of the promisor to act in any particular matter or manner. "A person cannot be bound by any rule of morality or good faith not to change his intention, nor can he be precluded from showing such a change merely because he has previously represented that his intentions were once different from those which he eventually executed." *Langdon v. Doud*, 10 Allen, 433. To the same effect is *Jackson v. Allen*, 120 Mass. 64. We find no reversible error in the record, and the judgment of the court below is therefore affirmed.

Street, C. J., Davis, J., and Doan, J., concur.

[Criminal No. 126. Filed February 23, 1898.]

[52 Pac. 361.]

JAMES F. PARKER, Defendant and Appellant, v. TERRITORY OF ARIZONA, Plaintiff and Respondent.

1. CRIMINAL LAW—APPEAL AND ERROR—LAWS 1897, ACT NO. 71, DOES NOT APPLY TO APPEALS IN CRIMINAL CASES.—Act No. 71, *supra*, "relating to appeals and writs of error from the district and circuit courts of the territory of Arizona to the supreme court," has no relation to appeals in criminal cases.
2. SAME—SAME—SAME—PRACTICE—CHANGE IN—MURDER—REVIEW UPON IMPERFECT RECORD—REV. STATS. ARIZ. 1887, PENAL CODE, PAR. 1880, CITED.—An appeal in a criminal case being erroneously taken under act No. 71, *supra*, this being the first session of the supreme court after the passage of the act, and paragraph 1880, *supra*, providing that the appellate court in criminal cases shall look into the record, and that the appeal shall not be dismissed if sufficient matter be contained in the record to enable the court to decide the cause on its merits, this court will not dismiss the appeal, or examine only into the indictment and judgment, where the charge is murder.
3. SAME—GRAND JURY—CHARGE.—A charge to the grand jury, calling their attention to a recent jail-breaking in which a citizen had lost his life, and asking that they investigate all of the circumstances pertaining thereto, and to make an early report, but containing no reference to the defendant, subsequently indicted by such grand jury for the murder of the citizen, is not error.

4. **SAME—TRIAL—SHACKLING PRISONER—HARMLESS ERROR.**—The shackling of a lawless, desperate character upon his first arraignment for murder is not reversible error where the record shows that the arraignment was set aside and fails to show that he was so shackled at the second arraignment or at any subsequent time during the trial.
5. **SAME—INDICTMENT—SETTING ASIDE—APPEAL AND ERROR—RECORD—INSUFFICIENCY—REV. STATS. ARIZ. 1887, PENAL CODE, PARS. 1513, 1387, CONSTRUED.**—Paragraph 1513, *supra*, provides: "The indictment must be set aside by the court in which the defendant is arraigned upon his motion in either of the following cases: . . . (4) When the defendant had not been held to answer before the finding of the indictment on any ground which had been good ground for challenge, either to the panel or to any individual juror [grand juror]." Paragraph 1387, *supra*, provides: "A challenge to an individual grand juror may be interposed if a state of mind exists upon his part in reference to the case or to either party which satisfies the court, in the exercise of a sound discretion, that he cannot act impartially and without prejudice to the substantial rights of the party challenging." This right can only be exercised, after the indictment, by the defendant, when he had not been held to answer before the impaneling of the grand jury, and was not present at the impaneling. Where the record shows that defendant was present at the impaneling of the grand jury, and does not show that he was not then charged with the crime of murder, he cannot complain of the overruling of his motion to set aside the indictment.
6. **SAME—SAME—SAME—MOTION—MUST BE SUPPORTED BY AFFIDAVITS OR RECORD.**—Motions to set aside an indictment, unsupported by affidavit, and not showing the nature or character of the evidence upon which they are based, are insufficient. They must be based upon some facts appearing from the record or otherwise produced before the court.
7. **SAME—CHANGE OF VENUE—PREJUDICE—SHOWING—TERRITORY v. BARTH, 2 ARIZ. 319, FOLLOWED.**—It is not error for the trial court to refuse a motion for a change of venue supported by the affidavits of defendant, his co-defendants, and five others, including his two counsel, tending to show a prejudice in the county which would preclude a fair trial, where the same was met by affidavits of eighty-four citizens, including nineteen grand jurors, who found the indictment, denying the existence of such prejudice. *Territory v. Barth, supra*, followed.
8. **SAME—MURDER—INSTRUCTIONS—PREMEDITATION AND DELIBERATION—EVIDENCE.**—Where the evidence showed that defendant and others broke jail, and in the scuffle the jailer made an outcry, and one Lee Norris came to his assistance, but, on seeing defendant armed with a shot-gun, turned to flee, when defendant shot him in the back, it

is not error for the court to refuse to instruct the jury that, under the evidence in the case, no deliberation or premeditation relating to the killing of Lee Norris has been proven by the prosecution, and therefore the defendant cannot lawfully be found guilty of murder in the first degree. It was the duty of the court, under proper instructions, to submit to the jury the question of premeditation and deliberation.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Yavapai. J. D. Bethune, Judge. Affirmed.

The facts are stated in the opinion.

J. E. Morrison, and George Arthur Allen, for Appellant.

C. M. Frazier, Attorney-General, H. D. Ross, District Attorney, and P. W. O'Sullivan, Assistant District Attorney, for Respondent.

STREET, C. J.—1. The appellant, James F. Parker, was indicted at the June term of the district court in the year 1897, by the grand jury of Yavapai County, for the crime of murder, upon which he was tried and convicted June 17, 1897, the jury affixing to their verdict the death penalty, upon which judgment and sentence of death were entered. Appellant was confined in the county jail of Yavapai County, at Prescott, and while so confined, on the ninth day of May, 1897, with one L. C. Miller and Cornelia Surrota, a Mexican, also confined in said jail, made their escape by overpowering the jailer, Robert Meador. In the scuffle the jailer made an outcry, and one Lee Norris, assistant district attorney of Yavapai County, being at that time in the office of the district attorney at the courthouse, ran to his assistance. The appellant, Parker, had obtained a shot-gun from the room of the jailer, and had it in his hands, when Lee Norris made his appearance on the stairway leading to the jail, seeing which, he turned to flee up the stairs when appellant shot him in the back, from which gunshot wound said Norris in a few hours died. Appellant, with his companions, went to a neighboring livery stable, seized some horses, and fled to the mountains. A sheriff's posse was organized, which gave pursuit, and, after a chase continuing many days, appellant was recaptured, and again placed in

the jail of Yavapai County. Appellant has prosecuted his appeal under the provisions of act No. 71 of the nineteenth legislative assembly of Arizona, 1897, being an act "relating to appeals and writs of error from district and circuit courts of the territory of Arizona to the supreme court," and has certified up the evidence and papers and files in the case, without any bills of exception or statement of facts. In this proceeding counsel for appellant are in error, and have mistaken the method prescribed for appeals in criminal prosecutions. The act above mentioned has relation only to appeals in civil cases. By a careful reading of that act it will be observed that it was not the intention of the legislature to make the same applicable to appeals in criminal prosecutions. It provides for appeals and writs of error, and speaks of plaintiffs in error and of appellees, neither of which terms is used in the statute designating the parties in criminal appeals, but are terms used in the statutes with reference to civil appeals. In criminal appeals the parties are designated as appellant and respondent, and no provision is made for writs of error. That act dispenses with bills of exceptions. Criminal appeals are heard upon bills of exceptions and statements of facts. The provisions of that act can be made applicable to civil appeals, but cannot be made applicable to criminal appeals without further or additional legislation upon the subject. The appellate court, however, is required to look into the record, and the appeal shall not be dismissed if sufficient matter or substance be contained in the record to enable the court to decide the cause on its merits. Pen. Code, par. 1880. The court in this instance is disposed to go further, and to review all the errors complained of. This is the first session of the supreme court since the passage of act No. 71, and counsel have permitted themselves to be led into the mistake of conceiving the law applicable to criminal appeals, without having had the guidance of the court upon this question. Under such circumstances, the court does not feel like summarily dismissing the appeal, or examining only into the indictment and judgment, where the charge is so serious as that contained in this indictment. In making the investigation, however, the court finds itself embarrassed from the lack of bills of exceptions.

2. First. The first assignment of error is, that the court erred in its charge to the grand jury. We find no charge to

the grand jury in the record, except in an affidavit of appellant and L. E. Miller, asking for a change of venue. But, referring to the language in that affidavit, and treating it as a matter properly before this court, the same as though it were contained in the bill of exceptions and statement of facts, we cannot find any language therein which refers to this defendant in any way. The attention of the grand jury is called to the recent jail-break, in which a citizen had lost his life, and asks them to investigate all of the circumstances pertaining thereto, and to make an early report upon the matter.

Second. The second assignment of error is, that the court erred in denying the defendant's motion to have his shackles removed when he appeared in open court upon his arraignment. As to the facts upon which that is based, the court is at somewhat of a loss, because of the lack of the bill of exceptions and statement of facts, for it appears from the minutes that the defendant was twice arraigned upon this indictment, —the first arraignment being set aside, and defendant was again arraigned; and it does not appear that he was in shackles at the time of the second arraignment. Paragraph 1106 of the Penal Code provides: "A person charged with a public offense shall not before conviction be subjected to any more restraint than is necessary for his detention to answer the charge," —which is but the common-law and constitutional right of a prisoner embodied in the statute. "It has, however, been the rule at common law that a prisoner brought into the presence of the court for trial, upon his plea of not guilty to an indictment for any offense, was entitled to appear free from all manner of shackles or bonds; and, prior to 1722, when a prisoner was arraigned or brought to the bar of a court to plead, he was presented without manacles or bonds, unless there was evident danger of his escape." *People v. Harrington*, 42 Cal. 167, 10 Am. Rep. 296, citing 2 Hale, P. C. 219; 4 Blackstone's Commentaries, 322; *Layser's Case*, 6 St. Trials (4th ed., by Hargrave) 230; *Waite's Case*, 1 Leach, 36. The record does not disclose the fact that the prisoner was in shackles during any other period of his trial, nor is it asserted by his counsel that he was so shackled. The record reveals the fact that the defendant was a lawless, desperate character, who had to be guarded with the greatest care and vigor. Thousands of dollars reward were offered for his recapture, as well as for

his original arrest for train robbery; and if it were a fact that he was in shackles at the time of arraignment, but not at the time of trial, the court could not consider that he had been unduly restrained of his liberty or deprived of his right to manage and control in person his own defense untrammelled, or that he was under such physical burdens, pains, and restraints as to confuse and embarrass his mental faculties.

Third. The third assignment of error is, that the court erred in overruling defendant's motion to set aside the indictment and his offer to introduce testimony to substantiate the allegations in said motion contained. Paragraph 1513 of the Penal Code: "The indictment must be set aside by the court in which the defendant is arraigned upon his motion in either of the following cases: . . . (4) When the defendant had not been held to answer before the finding of the indictment on any ground which had been good ground for challenge, either to the panel or to any individual juror [grand jury]." Subdivision 5 of paragraph 1387 provides: "A challenge to an individual grand juror may be interposed if a state of mind exists upon his part in reference to the case or to either party which satisfies the court, in the exercise of a sound discretion, that he cannot act impartially and without prejudice to the substantial rights of the party challenging." This right can only be exercised after indictment by the defendant when he had not been held to answer before the impaneling of the grand jury, and was not present at the impaneling. Without the aid of bills of exceptions, we have to depend upon the minute entries of the paneling of the grand jury, which is as follows: "There being a full panel of grand jurors present, and having been sworn to answer as to their qualifications, and examined and passed, now, on motion of the district attorney, prisoners James Parker, Abe Thompson, et al., . . . having been held to answer and being in custody, were brought into court for the purpose of exercising their right of challenge to the panel of the grand jury, or to any individual grand juror, if any they had. And the said prisoners, James Parker et al., . . . having no counsel, and stating to the court that they were unable to procure such, thereupon the court assigned counsel for said prisoners for this arraignment before the grand jury as follows: J. E. Morrison, G. A. Allen. . . . There being no challenges, and there being twenty grand jurors present, the

court appointed M. Bradley foreman of the grand jury, and, being sworn as such foreman, and the grand jurors being sworn, were duly charged by the court and retired, and the said prisoners were remanded to await the action of the grand jury in their respective cases." It is argued by counsel that the defendant had been held only to answer to the charge of train robbery, and that his presence before the court at the time the grand jury was impaneled only gave him an opportunity to examine the grand jury in reference to the defendant on that charge. When we take into consideration the history of the killing, flight, and recapture of the defendant, as exposed by the record, one would naturally think that the defendant would have been apprised of the fact that he was about to be accused of murder; and, if he were possessed of any caution, he would be desirous of inquiring of the grand jury of the existence of any bias or prejudice in their minds against him in connection with that charge. The record, however, shows he was present at the impaneling of the grand jury, and does not show that he was not then charged with murder, which would effectually dispose of that assignment of error.

But, furthermore, paragraph 1388 of the Penal Code provides that such challenges may be oral or in writing, and must be tried by the court. At the time of arraignment the defendant made the following motion: "Come now the above-named defendants, and show to the court that neither of them was held to answer upon the charge preferred against them in the indictment in this case, and move to set aside the indictment herein upon the following challenge to the hereinafter-named individual grand jurors, the said grand jurors being members of the grand jury which found and returned said indictment, to wit: That a state of mind exists, and did exist at the time of the finding of said indictment, and prior thereto, on the part of E. H. Fredericks, W. A. Deering, J. H. Ehle, Mark Bradley, Frank Doggett, A. Falco, J. P. Bruce, R. H. Burmister, J. G. Allen, J. R. Dillon, J. W. Archibald, Joseph John-drew, F. E. Jordan, J. M. Croxdale, Robert Drynau, A. G. Oliver, E. E. Gregory, A. A. Moore, E. J. Austin, and John Smith, in reference to this case, and to the said defendants, and to each of them, which prevented the said above-mentioned grand jurors, and each of them, from acting impartially in this case, and without prejudice to the substantial rights of

these defendants herein; and for the further reason that said indictment does not purport to show the names of the witnesses examined before the grand jury upon the finding of said indictment. Wherefore, the said defendants pray that the said indictment be set aside and held for naught. And thereupon defendants' counsel did offer and ask leave to introduce testimony and evidence to substantiate the allegations in said motion to set aside the indictment contained. Said motion was then argued, and the court, being fully advised, overruled said motion, and overruled said offer of defendants to produce proof of said allegations in said motion contained, to which said action of the court, the defendants then and there, in open court, then and there excepted." The defendants did not introduce any affidavit in support of said motion. There is nothing to show whether the grand jury was then in session and could have been examined or not. There was nothing to show the nature and character of the evidence, nor anything, in fact, upon which to base the motion. Motions to set aside indictments must be based upon some facts appearing from the record or otherwise produced before the court. It is not sufficient for counsel, orally or in writing, to say to the court, "We move to set aside the indictment and ask for the privilege to make proof," without having laid a foundation for their motion. The cases cited by appellant—to wit, *People v. Travers*, 88 Cal. 236, 26 Pac. 88, and *People v. Turner*, 39 Cal. 370—bear out the views of the court in this particular, and we see no error in the court having overruled the motion to set aside the indictment.

3. It is further assigned as error that the court erred in overruling the motion for a change of venue. The motion was supported by the affidavit of defendant and his co-defendant, L. C. Miller, and the affidavits of five others, including the two counsel for the defendant, tending to show that such a prejudice existed against the defendant in Yavapai County as would prevent him from having a fair trial; and the same was met by the affidavit of eighty-four citizens of Yavapai County, including nineteen grand jurors who found the indictment, denying the existence of such prejudice. Upon the authority of this court, as established in the case of *Territory v. Barth*, 2 Ariz. 319, 15 Pac. 674, it cannot be said that the court erred in refusing to grant a change of venue.

The remaining errors complained of refer to the instructions of the court and the overruling of the motion for a new trial. Appellant principally complained that the court refused to give the following instruction at his request, to wit: "The court instructs the jury that, under the evidence in this case, no deliberation or premeditation relating to the killing of Lee Norris has been proven by the prosecution. The court therefore instructs the jury that the defendant in this case cannot lawfully be found guilty of murder in the first degree." We cannot see any error in refusing to give this instruction. An examination of the evidence clearly made it the duty of the court to submit to the jury, under proper instructions, which were given, the question whether the killing of Lee Norris was done with premeditation and deliberation; and the court committed no error in refusing to give that instruction.

We have carefully examined the full record, notwithstanding the failure of counsel to present the errors complained of by way of bill of exceptions and statement of facts, and have been led to do this, not only because of the earnest efforts of counsel, and their zealous and masterly way of arguing every objection, but from the importance of the case itself. We find no error which would warrant a reversal of the case. The judgment of the district court is affirmed.

Sloan, J., Davis, J., and Doan, J., concur.

[Criminal No. 124. Filed February 23, 1898.]

[52 Pac. 368.]

SAMUEL DONNELLEY, Defendant and Appellant, v. TERRITORY OF ARIZONA, Plaintiff and Respondent.

1. **CRIMINAL LAW—AGGRAVATED ASSAULT—PRIEST'S RIGHT TO PUNISH CHILD—REQUEST OF PARENTS.**—A patriarch or priest, simply because he is such, cannot whip a child capable of appreciating correction, at the request of parents.
2. **SAME—SAME—PUNISHMENT OF CHILD—EVIDENCE—REQUEST OF PARENTS—MITIGATION.**—Under an indictment for aggravated assault, the intent with which the act was committed being an element of the

crime, it was error for the trial court to exclude evidence that the punishment of the child was at the request of parents, as it was proper for the jury to consider such evidence in determining whether defendant was guilty of simple or aggravated assault.

3. **SAME—SAME—WITNESSES—CHILD—QUALIFICATION — KNOWLEDGE OF NATURE OF OATH—CHARACTER OF TESTIMONY.**—It is error for the trial court to permit a child six years and eleven months old, upon whom it is alleged defendant made an assault, to testify, where it appears that he has little knowledge of the nature of an oath or the consequence of falsehood, except that he answered that people who told a lie would go to jail, especially where his story corroborates strongly his mother's, under whose instruction as to being a witness it is admitted he has been.

SLOAN, J., dissenting.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Cochise. J. D. Bethune, Judge. Reversed.

The facts are stated in the opinion.

C. W. Wright, for Appellant.

C. M. Frazier, Attorney-General, and W. H. Barnes, for Respondent.

STREET, C. J.—1. The appellant, Samuel Donnelley, was indicted by the grand jury of Cochise County, charging him with an aggravated assault upon a six-year-old child, in that he attempted to commit violent injury upon the person of a child. The evidence shows the assault consisted of ducking the child in a pond of water, the truth of which stood admitted, and whipping the child, which, as a fact, was contested and denied. On the summit of Huachuca range of mountains, in Cochise County, is a mining camp known as the "Copper Glance Mining Camp," sometimes known as "Donnelley's Camp." It is composed of a community of people who are shown to be under the spiritual and patriarchal control of the defendant, Samuel Donnelley, to the extent that they make him the "Moses" of their community, their ruler and guide, surrendering to him the control of their property and persons, and the management of their children, calling him their "spiritual teacher." The Copper Glance Mining Community is isolated from the rest of the world to the extent that no

wagon-road approaches the locality nearer than eight miles. The balance of the way is a trail, passable only to travelers on foot or on the backs of animals. This community of religious zealots have so completely surrendered themselves to the control and management of the defendant, Donnelley, that mothers testify they had surrendered the right of punishment of their children to the defendant, and instances were testified to in which he had punished children of the tender age of eleven months. The evidence in this case shows that the defendant, Donnelley, in the month of June, 1896, took a boy six years old and ducked him in a pond in the presence of the community, or a number of the members of the community. The ducking is admitted, but the intensity or severity of the same is in dispute. The mother of the boy testified that Donnelley tied a rope around the boy's body and threw him into the pond as far as he could throw him, and then, by means of the rope, pulled him back again; he threw him into the pond, and pulled him out, and this he did three times. The defendant and six other witnesses, who saw the transaction, testified that no rope whatever was used, but that Donnelley picked the boy up, and, with one foot on the bank of the pond and the other on a rock projecting above the water, dipped the boy into the pond but once, and that the water in the pond at that place was shallow. The mother and the boy both testified that after the ducking Donnelley whipped the boy with a buggy-whip,—the mother said, to the extent that welts were raised upon the boy's body. The evidence of one Parker tended to show that Donnelley whipped the boy after the ducking was over, although Parker did not claim to have seen it done. Donnelley and his six witnesses denied the whipping *in toto*, and said that nothing of the kind happened. The jury found Donnelley guilty as charged in the indictment.

There were many assignments of error, but we feel that we can dispose of the matter by determining the correctness of but one or two questions embodied in the assignment of errors: First, as to whether the court erred in refusing evidence to show that the mother of the child gave her consent to Donnelley to punish the child, or whether Donnelley did the acts charged in the indictment upon the request of the mother of the child, and the instructions of the court bearing

upon that point; secondly, the question as to whether the child, who was sworn and gave evidence, should have been allowed to testify in the case. The district court, in the trial of the indictment, refused evidence of the instructions from the mother to Donnelley as to how she wished the child punished,—the court ruling that he would allow proof as to the mother's request to Donnelley to correct the child, but would not allow proof that she had requested him to put the child into the pond, either in justification or mitigation of Donnelley's act,—and ruled that it was no excuse for him to show that she requested him or allowed him to put the boy into the pond. The court, also against the objection of defendant, permitted the child, who was then six years eleven months old, to be sworn and give testimony as to what took place eleven months before, when the child was six years old.

It is a principal of common law, which remains with us to the present day, that the parent may in a reasonable manner chastise his child, a schoolmaster his scholar, and also that those who stand *in loco parentis* may chastise children under their control; provided, always, that the chastisement be reasonable. A brother who provides a sister fifteen years of age with lodging, clothing, and schooling may inflict moderate correction. *Snowden v. State*, 12 Tex. Civ. App. 105, 41 Am. Rep. 667. A stepfather who supports his stepchildren is *in loco parentis*, and may reasonably chastise the child to enforce his authority. *Gorman v. State*, 42 Tex. 221. But there is no rule that a patriarch or priest, simply because he is patriarch or priest, can whip a child at the request of parents. This rule, also, is limited to children who are capable of appreciating correction, and it had been ruled that it did not extend to infants only two and one-half years old. The authority of a teacher extends only to the infraction of rules or misconduct while the child is under the direct charge of the teacher. "Though a schoolmaster has, in general, no right to punish a pupil for misconduct committed after the dismissal of school for the day, and the return of the pupil to his home, yet he may, on the pupil's return to school, punish him for any misbehavior, though committed out of school, which has a direct and immediate tendency to injure the school or subvert the master's authority." *Lander v. Seaver*, 32 Vt. 114, 76 Am. Dec. 156.

The doctrine of punishment, as applied to the pupil by the teacher, has never been extended to the spiritual advisers of a community by the common law. It does not appear that Donnelley was standing in the rôle of a schoolmaster or teacher, or had the direct charge of the child, but was called "teacher" by the community, in the sense that a witness testified: "He was the teacher of all of them,"—the teacher of the parents, and, being the teacher of the parents, was the teacher of the children.

The district court was right in holding that, even though the mother requested Donnelley to punish the child, such request could not be a justification, even though she had specified the particular way in which she desired the child punished. But we think the court failed to make a distinction between justification and mitigation, and the evidence ruled out and the instructions given had a tendency to take from the jury the consideration of the lesser offense included in the greater. An assault is defined by the statutes of Arizona "to be the unlawful attempt, coupled with the present ability to commit a violent injury upon the person of another." Pen. Code, par. 382. Paragraph 390 of the Penal Code makes such an "assault by an adult male on a child an aggravated assault." The lesser is included in the greater, and any evidence in mitigation of the graver offense, to show that the lesser has been committed instead of the greater, is legal evidence. Whipping is in itself punishment; and if an adult male should whip a child without any authority or license, he would be committing an assault upon the child; and, under the statutes of Arizona, the assault would be an aggravated one if the whipping was of any severity at all, or different from the most light and trivial chastisement. Whipping has always been considered an assault, and can only be justified under the law by the relation which is sustained between the child and the party administering the punishment. The only refreshing thing about a whipping is the memory of it in after years. Not so, however, with ducking in a pond. Thousands upon thousands of boys six and seven years of age refresh themselves in the sports of ducking themselves in ponds. It is not in its nature a punishment. The people the world over delight to bathe and duck themselves in water, and the size of the pond is not a feature to be taken into considera-

tion. The ocean itself is not too large for such occasions, nor can it be said that ducking in water is an improper or unusual way of chastising children. The common law, for certain offenses, recognized ducking as a punishment; but it is to be regarded as a punishment only as to the manner in which it is administered. A child may be put in such mortal fear by being ducked, even in a very small body of water, as to be an injury to its health and body. No one has a right to administer punishment by water in such a way as to bring fright, horror, and dread to the child; and the evidence in this case is that the child was severely frightened, and that he made a great outcry; that he struggled, and held so closely to the defendant Donnelley while Donnelley was trying to put him into the water that it was with difficulty that Donnelley could do so; that the child clutched at everything in sight, and grabbed hold of the bottom of the pond, so that, when he was brought up, his hands clenched the mud and gravel of the bottom, and he brought up handfuls thereof. Under these circumstances, it was within the province of the jury to determine whether it was an aggravated assault, or whether it was only a simple assault. Had the ducking been administered by the mother, it is quite reasonable to suppose that, although the child made an outcry, and although he struggled not to be put into the water, the jury would have found it a reasonable administering of punishment upon the part of the parent, who had a right to administer the punishment; or, if the punishment was unreasonable, that it was but a simple assault, or assault and battery.

The assumption of Donnelley to punish was a violent one, as he stood in no such relation towards the child as would give him the right to do so under the law. But there is a question of intent to be determined, which may be largely affected by the understanding of Donnelley as to his right to punish the child, derived from the consent or instruction of the parent. The indictment alleges that there was an attempt to commit violent injury. Such, also, is the language of the statute. Considering the relations which Donnelley sustained to the community, and the practices which he had been indulged in, at the request of the parents, in punishing their children, makes it appear a right to admit such evidence as would tend to show that he was not doing this violently and

of his own accord, but doing it under what he supposed to be a color of right, and with an intent to reasonably accord to the wishes of those who would have a right to do the very act which he did. For the court to deny the defendant that privilege would be to take from the jury the consideration of a fact and a condition which it was the right of the defendant to have the jury consider,—whether he was guilty of simple assault or aggravated assault. In this particular we think the district court erred in its rulings, and in its instructions to the jury based upon such ruling.

2. The other error complained of which we think it is necessary to look into is, that the court erred in permitting the child, Joe Warrington, six years and eleven months of age, to be sworn and testify for the territory and against the defendant. Joe Warrington was the child upon whom the assault was committed. The rule of common law in regard to the admissibility of children under the age of fourteen years as witnesses was made to depend upon their understanding, and upon their knowledge of the nature of an oath and the consequences of falsehood; and whenever it could be discovered by a court that the child had sufficient understanding of the nature of an oath, and the consequences of falsehood, he was permitted to be sworn and examined as a witness. In the case of *Commonwealth v. Hutchinson*, 10 Mass. 225, it was said to be the settled law at that time (1813): "If an infant appear, upon an examination by the court, to possess sufficient sense of the wickedness and danger of false swearing, he may be sworn, although of ever so tender an age. The credit of the witness is to be judged by the jury from the manner of his testimony and other circumstances." There is no precise age at which children are competent or incompetent. Children under the age of fourteen years will not be presumed to have sufficient understanding to be a witness, but investigation may disclose entire qualification. *Draper v. Draper*, 68 Ill. 17. "A child produced as a witness, who understands that he is brought into court to tell the truth, and that it is wrong to tell a lie, has sufficient understanding of an oath to be competent." *State v. Levy*, 23 Minn. 104, 23 Am. Rep. 678. "It is the duty of the presiding judge to examine the child, without interference of counsel, in regard to the obligation of an oath, and in the

proper cases to explain the same to one intelligent enough to comprehend what he says, and then to determine whether or not such child shall be sworn and permitted to testify." *Carter v. State*, 63 Ala. 52, 35 Am. Rep. 4.

Such examination was made, or partially made, by the trial judge in this case. It appears from the record that the offense for which the child was punished was for taking a piece of a stove and not returning it, and denying having taken it. Whether he took it in childish play, and forgot where it was left, or whether he took it willfully, and then lied about it, is not plain from the record. The trial judge, in his examination of the child before permitting him to be sworn, had with him the following dialogue: "*The Court.*—I am going to satisfy myself about it. Q. Is your name Joe or Josie?—A. Yes, sir.—Q. Where have you been living? Where did you live before you came here?—A. Before I got to come here?—Q. Yes; before you came up to town?—A. Down on the river.—Q. At whose house?—A. My grandpa's.—Q. Where did you live before that?—A. Up at the Huachuca.—Q. Whereabouts?—A. Huachuca.—Q. At brother Sam's place?—A. Who is brother Sam?—Q. That man over there [pointing to defendant].—A. What one?—Q. That man with black whiskers.—A. Yes, sir.—Q. You know him?—A. Yes, sir.—Q. How long have you known him?—A. For a year.—Q. Did you know him over in Huachuca?—A. Yes, sir.—Q. Well, now, do you know, if you tell a story, that it would not be right for you to tell a story? You know that, don't you?—A. Yes, sir.—Q. You know you ought to tell the truth, don't you?—A. Yes, sir.—Q. Now, you are going to state something here this morning. Do you understand that you are to tell the truth?—A. Yes, sir.—Q. And tell nothing but what you know yourself? Can you do that?—A. Yes, sir.—Q. Do you understand?—A. Yes, sir. *The Court.*—I am going to listen to this child's testimony." The child was then examined as a witness, and in his examination told very contradictory stories about the affair of the taking of the part of the stove, to wit: Cross-examination: "... Mr. Donnelley claimed you had taken a part of the stove, did n't he, away?—A. Yes, sir.—Q. And you said you did n't take it?—A. Yes, sir.—Q. And he said that you did, and you said that you did n't, and that was what you were

quarreling about, was n't it?—A. Yes, sir.—Q. Do you say you were telling the truth when you said that you did n't take the part of the stove?—A. Yes, sir.—Q. Did n't you take the stove?—A. I took a part of it.—Q. And you took a part of the stove, and carried that part away, and buried it?—A. I did n't bury it.—Q. What did you do with it? Did you take it out and hide it?—A. No, sir; I took it in the bushes.—Q. You dropped it in the bushes?—A. Yes, sir.—Q. You told Mr. Donnelley you did n't take this piece of the stove, and he said you did?—A. Yes, sir.—Q. And that is what he ducked you in the pond for?—A. Yes, sir.—Q. Now, afterwards you went off, and got this piece of a stove, and brought it back to him, did n't you?—A. Yes, sir." From which questions and answers it appears that Donnelley charged the boy with taking it, that he denied it, and said that he told the truth when he denied taking it, and that he did not take it, and then confessed that he did take it, and that he put it in the bushes, and, after he was ducked, he went and got it and brought it back. He does not reveal in his examination very much knowledge of the nature of an oath or the consequences of falsehood, except that he answered that people that told a lie would go to jail.

In the case of *Hughes v. Railway Co.*, 65 Mich. 10, 31 N. W. 605, a witness of about the same age made no more satisfactory answers to the questions put to him in regard to his knowledge of the nature of an oath and the consequences of falsehood than did this child, yet, as a witness, told quite a straight and consistent story as to how the accident happened in which he was injured, and the supreme court in that case thought that the trial judge had wrongly permitted the child to be a witness, and held that to permit him to testify was error. When we take into consideration that the testimony of this witness tended strongly to corroborate the testimony of the mother as to the extent of the ducking and whipping, and that he admitted that he was and had been under the instructions of his mother in regard to being a witness in the case, and the further fact that it is admitted that there was a great deal of feeling existing at the time of the trial against the defendant, it appears to the court that the trial judge should not have permitted the child to have been sworn and testify. Without noticing further errors

complained of, it is the judgment of this court that the judgment of the district court be reversed, and the cause be remanded to the same court for a new trial.

Davis, J., and Doan, J., concur.

SLOAN, J.—I concur in the opinion upon the first ground, but dissent from the conclusions reached upon the second assignment of error considered.

[Civil No. 620. Filed February 23, 1898.]

[52 Pac. 357.]

J. F. DAGGS, Plaintiff and Appellant, v. J. H. HOSKINS, JR., et al., Defendants and Appellees.

1. COURTS—JURISDICTION—CHANGE OF VENUE—CALLING IN JUDGE TO TRY CASE—POWER TO CALL IN SECOND JUDGE—LAWS 1891, ACT No. 40, SECS. 1, 2, CONSTRUED.—The presiding judge of the district does not lose jurisdiction of a case by entering an order, upon a motion for change of venue based upon an affidavit of bias and prejudice granting the motion, and in accordance with section 2 of act No. 40, *supra*, calling in another judge, who has consented to hear the cause at the original place of trial, so as to prevent him, upon inability of such judge to try the case on account of illness, to reassign the case to a third judge, consenting to try the same at said place.
2. JUDGMENT—FINDINGS OF FACT—GENERAL FINDINGS—LAWS 1897, ACT No. 22, SEC. 1, CONSTRUED.—Under the statute, *supra*, providing that "the facts found and the conclusions of law shall be separately stated," and not requiring that the findings shall be special, a general finding of the issues in favor of the defendants is sufficient to sustain a judgment of dismissal.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Coconino. Owen T. Rouse, Judge. Affirmed.

The facts are stated in the opinion.

George W. Glowner, and J. E. Jones, for Appellant.

If an order be made changing the venue of a cause, the original court immediately loses jurisdiction of the cause;

and since Judge Hawkins lost jurisdiction by making the order for the change of venue, any judge taking his place had no jurisdiction in the county of Coconino.

"When a change of venue is directed, . . . the court or judge shall send a cause to the most convenient county in the adjoining district." Act 1891, No. 40, p. 40. This is mandatory; and after ordering that the change of venue be granted the court had no jurisdiction to say that the case be tried in the county of Coconino, the county from which the change had been granted. *Flagley v. Hubbard*, 22 Cal. 37; *Hatch v. Galvin*, 50 Cal. 443.

The decision of a court is the findings of fact and the conclusions of law, which shall be separately stated.

The judgment is founded upon the decision, upon which it stands or falls. Without them the judgment falls. There being no decision in this case, the judgment cannot stand.

"The facts found and the conclusions of law shall be separately stated; judgment upon the decision shall be entered accordingly." Laws 1897, p. 60, Act No. 22. This act is mandatory. It therefore follows that a cause having been tried by the court without a decision a judgment cannot stand. The intention of the act is, that the decision of the court upon the facts shall form the basis of the judgment in like manner as the verdict of a jury. *Russell v. Armadon*, 2 Cal. 305.

Edward M. Doe, for Appellees.

The appellant objects that there were no separate findings of fact and conclusions of law, as required by our statute. This is true; and although under well-settled rules of statutory construction the requirement would seem to be directory, yet the supreme court of California has repeatedly held it to be mandatory. It does not appear, however, from the record that the appellant requested separate findings of fact and conclusions of law, and in view of the presumption which always prevails in favor of the judgment, it should be presumed in this court that the appellant waived the separate findings in the court below. *Lee Chuck v. Wo Chong & Co.*, 91 Cal. 592, 28 Pac. 44; *Mulcahy v. Glazier*, 51 Cal. 627; *Campbell v. Coburn*, 77 Cal. 37, 18 Pac. 860.

SLOAN, J.—The only assignments of error made by counsel for appellant in his brief which are sufficiently definite to

be considered are: 1. That the judge who presided at the trial below had no jurisdiction to sit therein, or make any order in the disposition thereof; and 2. The judgment is invalid because the trial court failed to file findings of fact and conclusions of law. The record shows that, after issues had been joined in the court below, a motion for a change of venue, based upon the prejudice of the presiding judge, was filed by the appellant. Thereupon the Honorable J. J. Hawkins, presiding judge, made and entered an order transferring the cause to the Honorable J. D. Bethune for trial. The latter, being unable to try the case on account of illness, made and entered an order transferring the cause to the Honorable Owen T. Rouse for trial. A similar order was made and entered by the presiding judge of the district. The first order made transferring the cause reads as follows: "Motion in the above cause to change venue having been heretofore taken under advisement, the court this day renders his decision therein, ordering that the motion be granted, and that, Judge J. D. Bethune having consented to hear the above case at Flagstaff, Coconino County, in the near future, it was ordered by the court that said cause be assigned to him at the place last aforesaid for trial." It was contended by counsel for appellant that under this order the district court of Coconino County lost jurisdiction of the cause. Act No. 40 of the Laws of 1891, in section 1 thereof, provides that: "Section 1. Whenever either party to a civil action in any district court of the territory shall make and file an affidavit in the case, stating one or more of the following causes: First: That the judge of said court has been engaged as counsel in the case prior to his appointment as judge, or is otherwise interested in the case; or, second: That said judge is of kin, or related to either party; or, third: That the affiant has cause to believe and does believe that on account of the bias or prejudice or interest of said judge, he cannot obtain a fair and impartial trial; or, fourth: That the said judge is a material witness in the case. In any such case the court, in term time, or the judge in vacation, shall change the venue in such action, or call some other judge of the supreme court of the territory to preside in the trial of the case; provided, some other judge of the supreme court will consent to preside in the trial of said cause, and try the same on or before the next

term of court after the date of such order calling him for such purpose." Section 2 provides: "Sec. 2. When a change of venue is directed for any of the causes mentioned in section one of this act, the court or judge shall send the cause to the most convenient county in the adjoining district, unless the parties in said action shall agree to some other county, in which event the cause shall be sent to the county so agreed upon by the parties." To this, in the same section, the proviso is made that "Provided, further, that if any judge of the supreme court shall consent to come to the county where said suit is pending and try said cause on or before the next term of court after the date of the order directing the cause to be tried by him, that no change of venue shall be granted for any of the causes mentioned in the first section of this act, but the case shall thereafter be tried and determined by said supreme judge, who shall have full authority and jurisdiction to hear and determine the same, as fully, to all intents and purposes, as if the case had been originally brought before him." It is plain from the above provisions of the statute that the presiding judge had full authority and jurisdiction to assign the case, in the first instance, to Judge J. D. Bethune, and, upon the inability of the latter to try the case on account of illness, to call in the Honorable Owen T. Rouse, who tried the case; and that the latter had full authority and jurisdiction to try and determine the same.

The assignment that the judgment is invalid by reason of the failure of the trial court to file findings of fact and conclusions of law is based upon the act of the legislature approved March 16, 1897, (No. 22, Acts 1897,) which reads as follows: "Section 1. That in all cases where a trial of an issue of fact is held by the courts of record of the territory, the decision of the court shall be in writing, and filed with the clerk, within thirty days after the trial takes place. In giving the decision, the facts found and the conclusions of law shall be separately stated. Judgment upon the decision shall be entered accordingly." In the judgment rendered by the court, the court found upon the issues joined between the parties in favor of the defendants, and made no other finding. The question therefore is presented as to whether or not a judgment based upon a general finding, under the statute above quoted, is invalid; in other words, are specific

findings of fact and conclusions of law vitally necessary to the validity of the judgment? There is some contrariety of decisions under statutes similar to ours upon this question. Many statutes, however, specifically provide that the court shall make special findings of facts, and under these statutes it has been generally held that a general finding for the plaintiff will not support a judgment in his favor. *Swanstrom v. Marvin*, 38 Minn. 359, 37 N. W. 455; *People v. Circuit Court Judge*, 34 Mich. 62; *Stansell v. Corning*, 21 Mich. 242. A different rule, however, is applied where there is a general finding for the defendant in the action, and a judgment dismissing the complaint. Our statute does not require that the findings of fact shall be special, but only requires that in the decisions of the court findings of fact shall be separately stated from the conclusions of law. We hold that the general finding of the issues in favor of the defendants sufficiently supports the judgment. The judgment will therefore be affirmed.

Street, C. J., Davis, J., and Doan, J., concur.

[Civil No. 602. Filed February 23, 1898.]

[52 Pac. 473.]

FARMERS AND MERCHANTS BANK, a Corporation,
Plaintiff and Appellant, v. L. H. ORME, Defendant
and Appellee.

1. ATTACHMENT—MORTGAGEE IN POSSESSION—LEVY, HOW MADE—LAWS 1889, ACT NO. 20, SEC. 9, SUBD. 2, CITED.—Where a mortgage of personalty is not in fraud of creditors, it is the duty of the sheriff, on finding the mortgagee in possession, to allow him to remain, and to levy upon the residue over the mortgage, by giving notice under section 9, *supra*, providing that where the defendant in execution has an interest in personal property, but is not entitled to possession, a levy is made by giving notice thereof to the one entitled to possession.
2. SAME—SAME—SAME—TAKING POSSESSION—TRESPASSER.—A sheriff becomes a trespasser by taking property under a writ of attachment from a mortgagee in possession under a valid mortgage.

3. CHATTEL MORTGAGE—INSOLVENCY—PREFERENCE.—A debtor, even in failing circumstances, may prefer creditors, if done in good faith, by giving a chattel mortgage to such creditors.
4. SAME—DEFECTIVE EXECUTION—DELIVERY OF POSSESSION — VALIDITY AS AGAINST SUBSEQUENT ATTACHMENT.—The voluntary delivery of property by a mortgagor to the mortgagee under a mortgage, not formally executed, but valid as between the parties, prior to the levy of an attachment, renders the mortgage valid as against such attaching creditors.
5. SAME—INSOLVENCY—PREFERENCE—EXCESSIVE VALUE OF STOCK MORTGAGED—NOT FRAUDULENT AS TO CREDITORS—GOOD FAITH.—Where a debtor in failing circumstances executed a mortgage of a stock of merchandise to a creditor, providing that such mortgagee should take possession and conduct the business theretofore conducted by the mortgagor until his debt was made out of the proceeds, and then the residue to be returned, such mortgage is not fraudulent and void as to the other creditors because of the excessive value of the stock mortgaged over the debt secured, where it appears that the mortgage was made in good faith and that to segregate a portion of the stock to secure the claim would have resulted in injury not only to the mortgagor but to other creditors.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge. Reversed.

The facts are stated in the opinion.

W. J. Kingsbury, and Joseph Campbell, for Appellant.

Property in the possession of a mortgagee cannot be seized and taken under an execution or attachment directed against the mortgagor. Jones on Chattel Mortgages, sec. 557; Cobbe on Chattel Mortgages, secs. 724-725; Freeman on Executions, secs. 116, 117; *Woodson v. Carson*, 135 Mo. 521, 35 S. W. 1005, 37 S. W. 197; *Poundstone v. Holt*, 5 Colo. App. 66, 37 Pac. 35; *Hausner v. Leebrick*, 51 Kan. 591, 33 Pac. 375; *Francisco v. Ryan*, 54 Ohio St. 307, 56 Am. St. Rep. 711, 43 N. E. 1045.

And this is true even though the chattel mortgage be executed by the debtor while in failing circumstances. *Tootle, Hosea & Co. v. Coldwell*, 30 Kan. 125, 1 Pac. 329; *Avery v. Eastes*, 18 Kan. 505; *Campbell v. Warner*, 22 Kan. 604.

And delivery of possession cures any defects that may exist in the mortgage. *Cameron v. Marion*, 26 Kan. 612;

Bank v. Sargent, 20 Kan. 576; *Franhauser v. Elliot*, 22 Kan. 127, 31 Am. Rep. 171; *Chapman v. Sargent*, 6 Colo. App. 438, 40 Pac. 849; *Sherwin v. Gagghagen*, 39 Neb. 238, 57 N. W. 1005.

C. W. Wright, for Appellee.

STREET, C. J.—1. This is an action in claim and delivery, brought by the appellant, the Farmers and Merchants Bank, as plaintiff, in the district court of Maricopa County, against L. H. Orme, sheriff of Maricopa County, to recover possession of a stock of hardware which L. H. Orme, as sheriff, held in his possession under a writ of attachment issued out of the said district court at the instance of the John Deere Plow Company against the Arizona Hardware Company on a suit brought by the John Deere Plow Company to recover the sum of \$5,826.89. The value of the goods, as laid in the complaint of plaintiff and in the affidavit to obtain the writ in claim and delivery, was six thousand dollars. The Arizona Hardware Company is a corporation doing business in Tempe, Arizona, and on the twenty-fifth day of October, 1895, was indebted to the Farmers and Merchants Bank on an overdue note in the sum of seven hundred and fifty dollars, with interest thereon, and at the same time was indebted to the John Deere Plow Company in the sum of \$5,826.89, as evidenced by seven overdue promissory notes, with interest thereon. The John Deere Plow Company on that day brought suit in the district court in Maricopa County against the Arizona Hardware Company, and obtained a writ of attachment against the property of said company, and placed the same in the hands of L. H. Orme, appellee, as sheriff of said county, for levy. On that day, and before the writ of attachment was levied by the sheriff, the Farmers and Merchants Bank went to Henry E. Kemp, the president of the Arizona Hardware Company, and told him that if their claim was not paid or secured they would have to issue a writ of attachment. Whereupon Kemp, as president of the Arizona Hardware Company, executed a chattel mortgage on all the stock of goods in the store of the Arizona Hardware Company at Tempe to the Farmers and Merchants Bank, and delivered it to them, and also turned over and delivered to the Farmers and Merchants Bank all the goods in their store at Tempe, and all book-accounts, promissory notes, business, etc., and put them in

possession thereof, to control and manage the business until they should obtain from the sales of goods enough money to pay and settle their claim of seven hundred and fifty dollars, with interest, and attorney's fees of one hundred dollars. This took place in the forenoon of that day, and was completed by 9 or 9:30 o'clock in the morning. The sheriff, L. H. Orme, with his writ of attachment, sued out at the instance of the John Deere Plow Company, went to the store of the Arizona Hardware Company on the same day about 1 or 1:30 o'clock in the afternoon, and found officers and agents of the bank in possession of the store and of all the goods. The sheriff told E. G. Frankenberg, the president of the Farmers and Merchants Bank, whom he found in possession, that he had a writ of attachment, and was going to levy upon the goods. Mr. Frankenberg told him that he (Frankenberg) had possession of the goods in the name of the bank, and that the bank held them as security for a debt of the hardware company, and that he would not surrender possession of the store or the goods. The sheriff asked him if he would resist, and whether he (the sheriff) would have to use force to put him out; and Frankenberg told him that he would resist, and that the sheriff could not get him out without force. The sheriff went away from the store, and after an hour or more returned, and did throw Frankenberg and the agents of the Farmers and Merchants Bank out of the store and possession of the goods, and did take possession of the entire stock of goods himself, under the writ of attachment. Thereupon the Farmers and Merchants Bank brought their action in claim and delivery, and obtained possession of the goods by virtue of their writ in claim and delivery, and at the time of the trial of the action in the district court were in possession of the goods, except such as had been sold in the course of trade. It was the testimony of Mr. Frankenberg at that trial that he thought they had sold enough goods to get their money back, but at that time it had not been applied upon the payment of the note; that they had taken in enough money by the sale of the goods to pay the note of the hardware company to the bank; and that they were willing then to let the balance of the goods go, but that, since the attachment of the John Deere Plow Company had been levied, five or six writs of garnishment had been served upon the bank in suits against

the Arizona Hardware Company. The cause was tried in the district court without the aid of a jury, and the court adjudged that the plaintiff take nothing by his suit, and that the defendant have and recover of and from the plaintiff, and Mons Ellingson and E. G. Frankenberg, sureties on the bond in the suit in claim and delivery, judgment for the return of the goods, or the sum of six thousand dollars, the assessed value of the goods, at the election of the defendant.

Many assignments of error have been made by the appellant, and appellee has likewise alleged many reasons why the plaintiff should not be allowed to recover in his action. Many of those urged by the appellant relate principally to the introduction of the writ of attachment and the levy, offered by the appellee, as defendant in the district court, in justification of his action in making the levy and seizing the goods; while many of the objections of appellee relate to the execution of the mortgage, claiming that it was not within the power of the president of the Arizona Hardware Company to make such a mortgage as was made by him and delivered to the Farmers and Merchants Bank, and alleging irregular execution, and other matters pertaining to the validity of the mortgage. All the objections, however, of that nature urged by appellant against the writ, and by appellee against the mortgage, are somewhat technical; and the court feels that, in the decision of this appeal, the matter can be disposed of by looking into the substance of the rights of the two creditors respectively; and the question plainly is whether the bank was legally and lawfully in possession of the stock of goods of the hardware company at the time the sheriff levied the attachment for the plow company, or whether such possession was in fraud of the rights of the plow company and other creditors, as it may be viewed in the light—first, of the right of a debtor in failing circumstances to prefer a creditor, and second, in the light of turning over property for the security of a debt, the value of which is greatly in excess of the amount of the debt.

2. If the mortgage was not in fraud of creditors, it was plainly the duty of the sheriff, on finding the bank in possession of the goods when he went to make the levy, to have allowed the goods to have remained in its possession, and for him to have seized upon the residue by giving notice under

the statute. Session Laws of 1889 (Act No. 20, sec. 9, subd. 2) provides: "A levy on personal property is made by taking possession thereof, when the defendant in execution is entitled to the possession; when the defendant in execution has interest in personal property but is not entitled to possession thereof, a levy thereon is made by giving notice thereof to the person who is entitled to the possession, or one of them, where there are several." Or the plaintiff in the writ of attachment might have brought garnishment proceedings upon the bank, and in that way secured itself in the residue. The mortgage given by the hardware company to the bank was drawn on a printed chattel-mortgage blank, in which it is provided that, until the mortgagee should take possession of the goods, which he might do under certain circumstances, therein expressed, the mortgagor should remain in possession, while in the written portion it was declared that all of the property had been turned over and delivered to, and was in the possession of, the said party of the second part. "If a mortgage contain a provision that the mortgagee may take possession at any time whenever he deems himself insecure, his exercise of this right invalidates any attachment that may have been previously made while the property was in the mortgagor's possession, and the sheriff becomes liable in trespass if he does not surrender possession upon the mortgagee's demand." Jones on Chattel Mortgages, 558, citing *Hall v. Sampson*, 35 N. Y. 274, 91 Am. Dec. 56. "A levy on mortgaged property for a debt of the mortgagor cannot be made after the mortgagee has taken possession, unless the mortgage be fraudulent and void. The liens created by a mortgage and attachment, respectively, on the same property, are essentially different, and cannot coexist." Cobbey on Chattel Mortgages, 724. Therefore, unless the mortgage given by the hardware company to the bank was void by reason of being in fraud of the rights of the plow company, the sheriff became a trespasser in taking the property from the agent of the bank.

3. Let us now look at some of the authorities in regard to the rights of a debtor in failing circumstances to prefer his creditors. "A debtor, even in failing circumstances, may prefer creditors, if the same is done in good faith; and this may be done, not only in the form of actual payment of

money to a particular creditor, but also in the form of sale or appropriation of property, or the giving of a chattel mortgage to such creditors." *Tootle etc. v. Coldwell*, 30 Kan. 125, 1 Pac. 329; *Hausner v. Leebrick*, 51 Kan. 591, 33 Pac. 375. Both of these cases are from the state of Kansas, and the court, in the latter case, repeated the language which appears in 1 Pac., and also said: "This court has also ruled that in all cases where there is a voluntary delivery of the property by the mortgagor to the mortgagee under the mortgage, such delivery will render the mortgage valid as to all persons not then having any specific right to a lien upon the property, provided the mortgage was previously valid as between the parties thereto." The latter quotation is decisive of the objection of appellee that the mortgage was not formally executed at the time of its delivery, for, as between the mortgagor and mortgagee, it was valid, and delivery of possession was made under it, and was recognized as subsisting and valid between the mortgagor and the mortgagee. If the mortgagee had not been in possession, but was claiming under a lien, and asking to be put into possession by virtue of his lien, the objection of appellee would be of force; and it would be necessary for the appellant to show that he, as mortgagee, had a mortgage which complied with the statute in every particular, not only as to its execution and its acknowledgment, but as to its registration. *Chapman v. Sargent*, 6 Colo. App. 438, 40 Pac. 849; *Sherwin v. Gagghagen*, 39 Neb. 238, 57 N. W. 1005.

4. Upon the question that the mortgage was fraudulent as to the other creditors, because goods to the value of six thousand dollars had been turned over to secure an indebtedness of somewhere about, yet less than, one thousand dollars, we understand the law to be that a mortgage made to secure an honest debt is valid as to the creditor secured, though the purposes and intent of the mortgagor may have been fraudulent; yet the parties who take such security must act in good faith, and so as not to unnecessarily hinder, delay, or deceive other creditors. But the taking of a mortgage of an amount in excess of the debt is but a badge of fraud, and only becomes a fraud in law when the purpose is to protect the debtor's interest from other creditors. If he took a mortgage in excess of the amount necessary for his security, for the purpose of hiding the debtor's interest from other creditors, instead

of in good faith protecting his own interest, he cannot ask to have his own interest protected when the fraud is discovered. If the mortgage is taken in good faith, without any fraudulent purpose upon the part of a creditor, the transaction will not be void even though the debtor intended, by giving such mortgage, to hinder and delay his other creditors in the collection of their debts, and even though the person secured had knowledge of such purpose. Different is the law in the case of a mortgagee from what it is with a party who purchases property of an insolvent debtor with notice that the purpose of the seller is to hinder and defraud his creditors; for in that case the purchaser will not be protected, although he may have paid for the property its full value. That rule does not apply in the case of a mortgage. A mortgage given by a failing debtor to secure an honest debt is not in violation of any principle of law, nor was it fraudulent, although the parties knew that the claim of other creditors would be thereby defeated. *Showman v. Lee*, 86 Mich. 556, 49 N. W. 578; *Patrick v. Riggs*, 105 Mich. 616, 63 N. W. 534; *Woodson v. Carson*, 135 Mo. 521, 35 S. W. 1006, 37 S. W. 197; *First Nat. Bank v. Lowrey*, 36 Neb. 290, 54 N. W. 571, 572. In this case there is no allegation, or even insinuation, of actual fraud. The execution and delivery of the mortgage by the hardware company to the bank was *bona fide*, given and accepted in the best faith, to enable the one to pay and the other to receive payment for an existing indisputable debt; and when that result was accomplished the residue of the property was to be turned back to the debtor, wherewith he might continue the business and pay other debtors. Whatever fraud could affect the transaction would have to arise from a presumption which the law creates; and, from the circumstances of excess of value alone over the debt, the law creates but a sign, a mark, a badge of fraud, which is destroyed as an index when the *bona fides* of the transaction is revealed by the manifest facts in which the transaction is imbedded, or when made apparent by extrinsic evidence. The determination of fraud from excessive value is affected also by a knowledge of whether only one article, not capable of division, or a combined number of articles, not capable of practical severance, is mortgaged and turned over for security, or whether numerous articles are dealt with, any one of

which, or any combined number of which, less than the whole, and capable of severance, would have been ample security. A store of goods is a combination of a multitude of salable articles, and, with the business it creates and by which it is kept alive, becomes an entity. A stock of hardware is made up of a variety of articles, and to make of them a store for their sale and disposal in the regular line of merchandry the articles and classes of articles composing the stock are so related to each, and so interdependent on each other, that they form an entity, which becomes destroyed by separating the articles composing the whole. This mortgage was given so as to enable the bank to make their money out of the store by "keeping store," and selling goods; and the more perfectly the store and business could be preserved, the more easily the money could be made to discharge the debt, and the sooner the residue could be turned back to the mortgagor. The object desired could not have been so easily obtained, nor would the rights of other creditors have been so well conserved, if a body of goods of a certain class, or of various classes, had been taken out of the store and sold separate from the business. It would have taken more goods thus to have paid the debt, and left the value of the residue diminished to a greater degree. We cannot say the mortgage was fraudulent because of excessive value of stock mortgaged over the debt secured. *Mercantile Co. v. Gardiner*, (S. D.) 58 N. W. 557, 559.

The judgment of the district court is reversed, and the cause remanded to the same court for a new trial.

Sloan, J., Davis, J., and Doan, J., concur.

[Civil No. 573. Filed February 23, 1898.]

[52 Pac. 353.]

JOHN T. DENNIS et al., Defendants and Appellants, v.
UNITED STATES OF AMERICA, Plaintiff and Appellee.

1. EVIDENCE—UNITED STATES TREASURY TRANSCRIPT—REV. STATS. U. S., SEC. 886, CONSTRUED—UNITED STATES v. ELLIS, 2 ARIZ. 253, AND UNITED STATES v. DRACHMAN, 4 ARIZ. 297, FOLLOWED.—A transcript, duly certified as provided by section 886, *supra*, showing the transaction connected with the bid of Drachman, his failure to comply with the terms of his proposal, the subsequent purchases by the quartermaster's department of hay, and the amounts paid for the same, and containing copies of Drachman's bid, the bond sued upon, and the correspondence between the chief quartermaster and Drachman relating thereto, is properly admitted in evidence in a suit by the United States against Drachman's bondsman to recover damages for his failure to comply with his bid. *United States v. Ellis*, and *United States v. Drachman*, *supra*, followed.
2. SAME—SAME—SAME—PRIMA FACIE CASE—SUPPLEMENTAL PROOF.—A treasury transcript, certified under section 886, *supra*, providing, "and the court trying the cause shall be authorized to grant judgment and award execution accordingly," is not to be construed as authorizing judgment in favor of the government unless such transcript in itself makes a *prima facie* case which is not overcome by defendant's evidence. If such transcript fails to make such *prima facie* case, it must be supplemented by such competent evidence as will entitle the government to a recovery under the well-settled rules of law governing the action.
3. BOND—CONTRACT—SALES—BREACH—MEASURE OF DAMAGES—FAILURE TO SUPPLY ARTICLE CONTRACTED TO BE FURNISHED—SUBSTITUTED ARTICLE—EVIDENCE—NECESSITY FOR PROOF THAT ARTICLE CONTRACTED FOR COULD NOT BE OBTAINED.—Where the treasury transcript shows a proposal to supply gramma hay at a certain price and a failure so to do and purchases by the government of other kinds of hay at various prices, the government cannot recover, in an action against a surety upon the bond to secure the performance of such proposal providing for the payment to the United States of the difference in money between the amount of the bid of said bidder and the amount for which the proper officer of the United States may contract with another to furnish "said supplies," the difference between the proposal and the price actually paid for other kinds of hay, without first proving that grama hay of suitable quality and quantity was not obtainable in the market at the time.

4. SAME — SAME — SAME — SAME — SAME—EVIDENCE—ADMISSIBILITY—

PROOF THAT ARTICLE COULD BE OBTAINED IN OPEN MARKET.—In an action on a bond conditioned to pay the difference between the price at which a certain article was proposed to be furnished and the price at which such article could be purchased from another, where the evidence of plaintiff shows the purchase of a substituted article, it is error to exclude evidence that the article contracted to be supplied could have been purchased in the open market at the time and place it was contracted to be delivered.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. Joseph D. Bethune, Judge. Reversed.

The facts are stated in the opinion.

C. M. Frazier, for Appellants.

E. E. Ellinwood, United States District Attorney, for Appellee.

SLOAN, J.—This is a suit brought by the United States against Phillip Drachman, H. Goldberg, and John T. Dennis to recover the sum of \$5,988.16 damages alleged to have accrued to appellee upon the breach of a bond given by said Phillip Drachman as principal and said H. Goldberg and John T. Dennis as sureties to secure the faithful performance by said Drachman of his written proposal to supply the government at Fort Huachuca with 1,800,000 pounds of grama hay. Drachman and Goldberg having died before trial, the case was proceeded with against appellant Dennis. The cause was tried before a jury, and a verdict rendered for \$3,556 against appellant, and judgment entered thereupon. From this judgment and the order overruling the motion for a new trial appellant appeals.

This cause has been twice before this court. Upon the first appeal the cause was reversed upon the ground that the trial court excluded from the evidence a transcript duly certified as provided by section 886 of the Revised Statutes of the United States, showing the transaction connected with the bid of Drachman, his failure to comply with the terms of his proposal, the subsequent purchases by the quartermaster's department of hay, and the amounts paid for the same, and containing copies of Drachman's bid, the bond sued upon,

and the correspondence between the chief quartermaster and Drachman relating thereto. The court held, following the case of *United States v. Ellis*, 2 Ariz. 253, 14 Pac. 300, that the transcript, being an account of the war department, came within the provisions of said section 886, and should have been admitted as evidence. *United States v. Drachman*, 4 Ariz. 297, 43 Pac. 222. Upon the retrial of the case this transcript was admitted in evidence, over objection, and this ruling is made the basis for one of the appellant's assignments of error.

We have carefully read the statute in the light of *United States v. Ellis* and *United States v. Drachman*, and see no good reason why these well-considered cases should not be followed. In holding, however, that this transcript was properly admitted in evidence, we do not wish to be considered as deciding that it made a *prima facie* case in favor of the government. The statute reads as follows: "Sec. 886. When suit is brought in any case of delinquency of a revenue officer, or other person accountable for public money, a transcript from the books and proceedings of the treasury department, certified by the register and authenticated under the seal of the department, or when the suit involves the accounts of the war or navy departments, certified by the auditors respectively charged with the examination of those accounts, and authenticated under the seal of the treasury department, shall be admitted as evidence, and the court trying the cause shall be authorized to grant judgment and award execution accordingly. And all copies of bonds, contracts, or other papers relating to, or connected with, the settlement of any account between the United States and an individual, when certified by the register, or such auditor, as the case may be, to be true copies of the originals on file, and authenticated under the seal of the department, may be annexed to such transcript, and shall have an equal validity and be entitled to the same degree of credit which would be due to the original papers, if produced and authenticated in court." We construe the clause, "and the court trying the cause shall be authorized to grant judgment and award execution accordingly," to mean that in a case of this kind, whenever the treasury transcript shows upon its face a breach of a bond given to secure the faithful performance of a contract for delivery of supplies

to the war department, and further shows a loss to the government resulting therefrom, such a case is made out as will authorize judgment for such loss, if the *prima facie* case thus made be not overcome by competent evidence. But should the transcript fail to show a breach of the bond, or fail to show damages which are the proximate and direct result from said breach, under the terms of the bond, the government, in order to make out a case, must supplement the evidence presented by the transcript by such competent evidence as will entitle the government to a recovery under the well-settled rules of law governing actions of this kind. The transcript in this case shows the following facts: In April, 1885, A. J. McGonigle, chief quartermaster of the department of Arizona, advertised for sealed proposals for furnishing and delivering certain military supplies during the fiscal year ending June 30, 1886, at certain military posts of the United States, among which was Fort Huachuca, in this territory. In accordance with said advertisement, Phillip Drachman, on April 25, 1885, sent to said quartermaster a written proposal to furnish to the government, at Fort Huachuca, 1,800,000 pounds of grama hay at ninety-three cents per one hundred pounds. Accompanying said proposal was a bond executed by said Drachman as principal and said Goldberg and said Dennis as sureties, the condition of which said bond was that "In case said bidder shall fail to enter into contract within ten days with the proper officer of the United States, and furnish good and sufficient bond for the faithful performance of the same, according to the terms of said bid and advertisement, we and each of us hereby stipulate and guaranty and bind ourselves and each of us, our and each of our heirs, executors, and administrators, to pay to the United States the difference in money between the amount of the bid of the said bidder and the amount for which the proper officer of the United States may contract with another party to furnish said supplies, if the latter amount be in excess of the former for the whole period covered by the proposal." This bond was required of bidders under the regulations of the department and under the terms of the advertisement. On May 29, 1885, the said quartermaster notified in writing said Drachman of the acceptance of his proposal. On June 26, 1885, Drachman, by letter, notified the chief quartermaster that he

was unable to comply with his proposal, for the reason that he could not give the requisite bond. The transcript further shows that, after the failure of said Drachman to carry out his contract, the government, during the fiscal year ending June 30, 1886, purchased, under contract, for use at Fort Huachuca, 840,000 pounds of baled barley hay, 300,000 pounds of loose alfalfa hay, 60,000 pounds of wheat straw, and 400,000 pounds of baled barley straw, at the total cost to the government of \$20,868.16. It will be seen that Drachman's contract was to furnish 1,800,000 pounds of grama hay, and the contract of his sureties, as contained in the bond, was, that in case of Drachman's failure to enter into contract within ten days with the proper officer of the United States, and to furnish good and sufficient bond for the faithful performance of the same according to the terms of said bid and advertisement, they would pay to the United States the difference in money between the amount of the bid of said bidder and the amount for which the proper officer of the United States may contract with another party to furnish said supplies, if the latter be in excess of the former, for the whole period covered by the proposal. The proposal was to furnish grama hay. The term "said supplies," as found in the bond, had reference, therefore, necessarily, to the particular kind of hay named in Drachman's bid,—namely, grama hay. The transcript does not show that the contracts for the hay and straw subsequently purchased by the government for use at Fort Huachuca were let upon advertisement, nor does it show that merchantable grama hay was not obtainable by the government, or that any effort was made by the government to obtain grama hay for use at Fort Huachuca. In addition to the treasury transcript, the only evidence introduced by the government was the testimony of Major McGonigle, the chief quartermaster of the department of Arizona at the time when these transactions occurred. The witness was not able to say with certainty whether the subsequent purchases of hay were made upon advertisement and bids. He was not able to say whether grama hay of suitable quality, and in the quantity desired, was available for use at Fort Huachuca, or whether any efforts were made to procure the same, or whether any offers were made to furnish grama hay by other parties. The defendant offered to prove by

witnesses that an abundance of grama hay was obtainable for use by the government during the time covered by Drachman's proposal. But this offer of proof was denied by the trial court upon objection, and the case went to the jury practically upon the facts as shown by the treasury transcript. Upon the case thus made out the court instructed the jury that "The fact, if it be a fact, that the plaintiff, through its proper officers, purchased alfalfa and barley hay to fill the amount required by the said quartermaster upon the default of the defendants, if you find they did so default, is no defense to this action. That, as a matter of law, under the provisions of the contract or guaranty sued upon, plaintiff could contract for and purchase any kind of hay which would meet the requirements of the said quartermaster and the United States army." The bond in this case primarily fixes the measure of damages for a breach of the contract in the difference in price which the government might pay for the purchase of the supplies proposed by Drachman in his bid, which, as we have seen, was grama hay, and the price named by him in his bid. The instruction of the court ignores this stipulation of the bond, and without qualification the law is stated to be, that the sureties upon the bond are liable for the difference between the price of grama hay as named by Drachman in his bid and the price of any kind of hay which the government might see fit to purchase.

The ordinary measure of damage for the breach of a contract to furnish a particular article is the difference between the contract price and the market value of the same article at the time and place of delivery. This rule is subject to the qualification that when it appears that the particular article contracted for cannot be had, but the buyer is compelled to purchase another article to take the place of the one contracted for, then the measure of damage will be the difference of the contract price of the article agreed to be delivered and the market value of the substituted article. The buyer, however, must show, in order to recover the difference in price between the article contracted for and the substituted article, that the former was not available, and the substitution was therefore made necessary. If, therefore, in this case, it had been shown that grama hay of sufficient quantity and of merchantable quality was available for use at Fort Hua-

chuca, and could have been obtained by the proper officer after the breach of Drachman's contract, and during the time covered by his proposal, then the measure of damage would not be the difference between the price of grama hay as named by Drachman in his bid and the price for other kinds of hay which may have been purchased by the government, but the difference between the price as contracted for and the market value of grama hay during the time covered by the proposal. The question, therefore, as to whether grama hay of suitable quality and sufficient quantity could have been procured to take the place of that contracted for by Drachman, was a question which should have been submitted to the jury; and the ruling of the court in refusing the offer of proof on the part of the defendant and in giving the instruction above set forth was erroneous; and for these reasons the cause will be reversed and a new trial granted.

Davis, J., and Doan, J., concur.

[Civil No. 581. Filed February 23, 1898.]

[52 Pac. 366.]

SIXTO MOLINO, Defendant and Appellant, v. JOHN
BLAKE, Plaintiff and Appellee.

1. PLEADING—OPEN ACCOUNT—VERIFIED UNDER REV. STATS. ARIZ. 1887, PAR. 1880—ANSWER—SUFFICIENCY—JUDGMENT ON PLEADINGS.—In an action for balance of an unpaid account, defendant answered with a general denial, and set up a counterclaim alleging mutual accounts and a balance due him. To the counterclaim, and made a part thereof, was attached a verified account showing various items of indebtedness constituting the same. To this counterclaim plaintiff filed a verified reply, admitting that there were such mutual accounts, but alleging that the same had been settled, and that a balance thereon was found due plaintiff, which was agreed to by defendant, and that thereafter defendant had made payments on such balance, reducing it to the amount claimed by plaintiff in his complaint, which was still due and unpaid. Under the pleadings, defendant's motion for judgment on the pleading, on the ground that there was no sufficient denial under oath, as required by paragraph 1880, *supra*, of the verified account pleaded in said counterclaim, was properly denied.

2. PLEADING—OPEN ACCOUNT—ACCOUNT STATED—COMPLAINT—REPLY—
REPUGNANCY—CONSTRUCTION—EVIDENCE.—Where plaintiff's complaint is for a balance due upon an open account, and defendant counterclaims upon mutual accounts, and plaintiff in reply thereto sets up an account stated and a balance due thereon, the same as pleaded in the original account, it is not error to permit plaintiff to testify as to an account stated, the complaint and reply not being repugnant, and therefore to be construed together.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Graham. Owen T. Rouse, Judge. Affirmed.

The facts are stated in the opinion.

Wiley E. Jones, and E. J. Edwards, for Appellant.

Moorman & McFarland, and J. M. McCullom, for Appellee.

The complaint stated concisely that the defendant was indebted to the plaintiff in the sum of \$537.11, which was the balance due on account, and that the defendant admitted and acquiesced in this balance "by paying \$218.09 on the same," thereby reducing it to the sum of \$319.02, for which he prayed judgment and costs of suit. The facts stated constitute a good cause of action on an account stated. *Union Bank v. Knopp*, 3 Pick. 96, 15 Am. Dec. 182; *Warren v. Caryl*, 61 Vt. 331, 17 Atl. 741; *Powell v. Pacific Railroad Co.*, 65 Mo. 658; *Watkins v. Ford*, 69 Mich. 357, 37 N. W. 300; *Nostrand v. Ditmis*, 127 N. Y. 355, 28 N. E. 27.

There was no demurrer interposed to the complaint; hence every reasonable intendment is indulged in favor of the complaint. If objection is not taken by demurrer, the defendant shall be deemed to have waived the same. The only exception is the question of jurisdiction. Bliss on Code Pleading, sec. 434; *Pearce v. Minton*, 1 Cal. 470; *See v. Figg*, 37 Cal. 328, 99 Am. Dec. 271.

Should there be any doubt as to the cause of action declared upon, this question is settled by appellee's plea to defendant's amended answer. This plea is specially authorized when defendant sets up a counterclaim. The statute provides "plaintiff may plead thereto under the rules prescribed for pleadings of defensive matter by the defendant."

SLOAN, J.—The appellee, John Blake, commenced an action in the court below against the appellant, Sixto Molino, by filing the following complaint: "The plaintiff complains and alleges: (1) That both plaintiff and defendant are residents of Graham County, Arizona. (2) That the defendant is indebted to the plaintiff in the sum of three hundred nineteen and two one-hundredths dollars for the balance of an account for money and goods and merchandise furnished and delivered by said plaintiff to said defendant, at his instance and request, between the — day of March, 1895, and the 15th day of June, 1895; that the whole and aggregate amount of defendant's indebtedness to plaintiff is the sum of five hundred thirty-seven and eleven one-hundredths dollars, and that defendant has paid thereon the sum of two hundred eighteen and nine one-hundredths dollars, the balance of said account first aforesaid, to wit, three hundred nineteen and two one-hundredths dollars, still being unpaid; that plaintiff has demanded payment thereof of said defendant, and that he has failed and refused, and still fails and refuses, to pay the same; and that the same is now due, and no part of it has been paid. Wherefore plaintiff demands judgment against said defendant for the sum of three hundred nineteen and two one-hundredths dollars, and for costs of this action." Appellant, in addition to the general denial in his answer, set up a counterclaim, in which he alleged that there existed between the plaintiff and the defendant an unsettled, mutual, and current account of reciprocal demands, running from the first day of April, 1891, up to and including the fifteenth day of October, 1895; and that there was due to defendant from plaintiff, after deducting the amount claimed by plaintiff upon said account, a balance of \$2,095.56. To the counterclaim, and made a part thereof, was attached a verified account showing various items of indebtedness constituting the same. To this counterclaim appellee filed a reply, admitting that there were mutual and current accounts between plaintiff and defendant from the — day of March, 1891, to the second day of March, 1895, and alleging that on the last-named day plaintiff and defendant settled and adjusted their respective accounts, including the account set up in the counterclaim, and that at said settlement there was found due plaintiff a balance amounting to \$417.67, which sum was

agreed by defendant to be the balance due plaintiff upon that date; that subsequent to said settlement and agreed balance, defendant paid plaintiff, on account of said balance, different amounts at the time in said counterclaim stated, leaving still due from defendant to plaintiff the sum of \$319.02, for which sum plaintiff prayed judgment as in his complaint. The reply was verified by the oath of appellee. Upon the issues thus joined the cause went to trial before the court. Before the introduction of any evidence appellant moved for judgment upon the pleadings, upon the ground that the verified account attached to the counterclaim was not denied under oath. This motion was denied by the court. Thereupon the plaintiff testified to the settlement and adjustment of the accounts of plaintiff and defendant on the second day of March, 1895. This evidence was objected to by appellant, for the reason that an account stated was not pleaded in the complaint. This objection was overruled. Plaintiff then further testified that, upon the adjustment of the accounts, it was mutually agreed, by and between himself and the defendant, that a balance of \$417.67 was due plaintiff; that thereafter defendant made different payments, which left, at the time of the institution of the suit, a balance due of \$319.02. Plaintiff then rested his case. Defendant then offered in evidence his verified account attached to his counterclaim. This was objected to by the plaintiff, and the objection was sustained. No other evidence having been proffered by the defendant, the court then gave judgment for the plaintiff in the amount sued for. From this judgment and from the order overruling a motion for a new trial appellant appeals.

Two assignments of error are alleged by appellant in his brief. The first is based upon the denial of appellant's motion for judgment upon the pleadings, the contention being that the account constituting appellant's counterclaim being verified as permitted by paragraph 1880 of the Revised Statutes of Arizona, there was no sufficient denial under oath by appellee, and therefore the court should have granted judgment for the amount thereof. Said paragraph 1880 reads as follows:—

"1880 (sec. 56). When any action or defense is founded upon an open account, supported by the affidavit of the party, his agent or attorney, taken before some officer authorized to

administer oaths, to the effect that such account is, within the knowledge of the affiant, just and true, that it is due, and that all just and lawful offsets, payments and credits have been allowed, the same shall be taken as *prima facie* evidence thereof, unless the defendant shall, at least one day before the trial, file a written denial under oath, stating that such account is not just or true in whole or in part, and if in part only, stating the items and particulars which are unjust. Where he fails to file such affidavit he shall not be permitted to deny the account or any item therein, as the case may be."

The reply made by appellee to the cross-complaint in effect was a denial of the justness of the whole of the account set up by appellant, and, as it was verified by the affidavit of the plaintiff in the action, it was a full compliance on his part with the requirements of the statute, and required the appellant to prove the same by competent evidence. The court, therefore, very properly denied appellant's motion for judgment.

The other assignment made is based upon the action of the court in permitting appellee to testify to an account stated, upon the ground that no account stated was pleaded by him in his complaint. While the complaint cannot be construed as pleading an account stated, the reply to defendant's cross-complaint does affirmatively so plead. The complaint and the reply are not repugnant, and therefore should be construed together. The appellant chose to go to trial upon the pleadings as they stood, and as the only issue presented was the issue of fact as to whether or not there had been an adjustment and settlement of the accounts of the parties upon the second day of March, 1895, the testimony objected to was properly admitted. We see no error in the ruling of the court complained of. The judgment is therefore affirmed.

Street, C. J., Doan, J., and Davis, J., concur.

[Civil No. 593. Filed April 16, 1898.]

[53 Pac. 207.]

L. J. WEBBER, Plaintiff and Appellant, v. P. L. KASTNER et al., Defendants and Appellees.

1. EXECUTIONS—LEVY—SUFFICIENCY—RECITALS IN NOTICE AND CERTIFICATE OF SALE—INTEREST CONVEYED.—A sale to a judgment creditor of an interest in a mining claim owned by the judgment debtor is valid and sufficient to pass the title of the judgment debtor held at the time of the levy of the execution, though the sheriff in making the levy recited that he levied on the right, title, and interest owned by defendant on January 15, 1891, eight months prior to the date of the judgment and execution, it sufficiently appearing that in the notice of sale given under the levy that the sheriff had levied upon the interest which defendant had on January 15, 1891, "or now has," and in the certificate of sale that, under and by virtue of a certain execution, etc., he is required to satisfy the judgment "out of the real property belonging to the said defendant on the fifteenth day of January, 1891, or at any time thereafter," and it further reciting that he had levied on all of the interest of said defendant in said mining claim.
2. SAME—SALE—DUPLICATE CERTIFICATE OF SALE FILED UNDER LAWS OF 1889, ACT NO. 20, SEC. 19, SUBD. 3, NEED NOT BE RECORDED—FILING CONSTRUCTIVE NOTICE.—A duplicate of a certificate of sale of real estate under execution filed, as provided by statute, *supra*, in the office of the county recorder, is not required to be recorded and the filing thereof is made constructive notice of such sale to subsequent purchasers.
3. CONVEYANCES—INNOCENT PURCHASERS—EVIDENCE—STATE OF RECORD TITLE.—Where an indorser of a sheriff's certificate of sale quits-claims his interest in the property conveyed thereby, and the grantee testifies positively that nothing was said in the negotiations for the deed that gave him an intimation that the same interest had been theretofore conveyed to plaintiff by the indorsee by an unrecorded deed, he will be held to be an innocent purchaser for value, the indorsee's recollection being at fault as to what was said upon that subject at the time of the transaction, and it appearing that no sheriff's deed had been made, though the time for redemption had long since expired.
4. APPEAL AND ERROR—CONFLICT OF EVIDENCE—WHEN REVERSED.—This court cannot disturb a finding not supported by the weight of the evidence, unless the preponderance of evidence against the finding be so marked that no reasonable view of the testimony can be taken which will support it.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Yavapai. A. C. Baker, Judge. Affirmed.

The facts are stated in the opinion.

J. F. Wilson, and E. M. Sanford, for Appellant.

As the defendants claim under the judgment debtor since the date of the sheriff's sale, neither he nor they can attack the proceedings at that sale. The sale by the sheriff was tantamount to a sale by himself, and therefore he cannot, nor can they, holding under him, thus shake off the legal consequences thus fixed by any device of this kind. See *Cooper v. Galbreath*, 6 Fed. Cas. 474; s. c. cited and approved in *French v. Edwards*, 13 Wall. 506.

The levy and certificate of sale was recorded as stated. Revised Statutes and acts amendatory thereof require the same to be recorded. Therefore, it, with deed that should follow, unless redeemed in time allowed by statute, was constructive notice to the world. *Atwood v. Bears*, 45 Mich. 469, 8 N. W. 55; *Foorman v. Wallace*, 75 Cal. 552-556, 17 Pac. 680. It is within the recording acts. *Raymond v. Pauli*, 21 Wis. 531; *Gardner v. Eberhart*, 82 Ill. 316; *Evans v. Ashley*, 8 Mo. 177.

The certificate, as recorded, continues notice until the deed to follow is also recorded. *Page v. Rogers*, 31 Cal. 294.

Whatever puts one on inquiry amounts to notice. *Woodfolk v. Blount*, 3 Hayw. 147, 9 Am. Dec. 736; *Simmons v. Doran*, 142 U. S. 417, 12 Sup. Ct. 239; *Commercial Bank v. Lee*, 99 Ala. 493, 12 South. 572, 19 L. R. A. 705; *Tank etc. Co. v. Kansas City etc.*, 45 Fed. 16.

The fact that the deed was a quitclaim, and the consideration so small, coupled with the fact written in the face of the deed by Johnston, was notice. It was suspicious, and put the defendants on inquiry. *Bagley v. Fletcher*, 44 Ark. 153; *Gaines v. Summers*, 50 Ark. 322, 7 S. W. 301; *McDonald v. Belding*, 145 U. S. 153, 12 Sup. Ct. 892; *Simmons v. Doran*, 142 U. S. 417, 12 Sup. Ct. 239; *Baker v. Humphrey*, 101 U. S. 494.

Herndon & Norris, and C. F. Ainsworth, for Appellees.

SLOAN, J.—Appellant, Luther J. Webber, brought suit in the court below to quiet title to an undivided one-fourth

interest in and to the Waters Mine, situated in Eureka Mining District, Yavapai County, Arizona. The defendants named in the complaint were Thomas Brown and P. L. Kastner (doing business under the firm name of Brown & Kastner), James H. Wright, and Chauncy D. Clark. The case against Wright was dismissed before trial, and the cause proceeded against the remaining defendants. There was a judgment for the defendants, quieting in them title to an undivided one-sixth interest in and to the property in controversy. From this judgment plaintiff appeals.

The record discloses the following facts: On the seventh day of September, 1892, in the district court in and for the county of Mohave, one John Howard obtained a judgment against one H. A. Owens for the sum of \$3,786.49. On the ninth day of September, 1892, an execution directed to the sheriff of Yavapai County was issued out of said court upon said judgment against the property of Owens, the judgment debtor. On October 22, 1892, the sheriff of Yavapai County, under said writ of execution, levied upon a one-third interest possessed by Owens in the Waters mining claim; and, upon the same day, filed a copy of said writ of execution, with the indorsement of said levy thereon, in the office of the county recorder of said county. On the 18th of November, 1892, after due notice thereof, the said sheriff sold at public sale the interest of Owens in the Waters Mine, levied upon as aforesaid, at which sale the said property was bid in by Howard, the execution creditor. Upon the same day, the sheriff gave Howard a certificate of sale, a duplicate of which was filed in the office of the county recorder, November 21, 1892. Upon this certificate as filed appeared the following indorsement: "I, John Howard, do hereby certify that T. W. Johnston, attorney, etc., owns and controls a three-fourths interest in the interest in the foregoing properties above conveyed to me. Witness my hand, this 18th day of November, 1892. JOHN HOWARD." The certificate was not recorded, but remained among the files of the recorder's office. March 6, 1894, the sheriff executed a deed to the three fourths of the one-third interest in and to the Waters Mine to one Luther J. Webber, the appellant, in which deed it was recited that Howard had assigned his said interest to T. W. Johnston, as appeared from the certificate of sale and the indorsement

thereon, and that Johnston had directed and required that the deed to said interest be made to Webber. This deed was not placed of record until the eighteenth day of July, 1895. On the eighteenth day of April, 1894, Owens conveyed to P. L. Kastner and Thomas Brown, copartners, under the firm name of Brown & Kastner, an undivided one-sixth interest in and to the said Waters Mine, which deed was duly recorded on the date of its execution. On May 17, 1895, Brown & Kastner joined with J. H. Wright, one Abbendroth, and one Bowe (the latter representing interests not in controversy here) in conveying the Waters Mine to Chauncy D. Clark, a defendant in the action, and one of the appellees here. On the same day Howard and T. W. Johnston, by one conveyance, quitclaimed all their right, title, and interest in and to said mine to said Clark. In the latter conveyance appears the recital that the said T. W. Johnston "claims no interest in said mining claim, and only signs and executes this deed to clear the title thereof of any real or imaginary cloud upon the title." The consideration named in the latter deed was one dollar, but the fact appears to have been that the real consideration was the sum of one hundred and fifty dollars, paid by Kastner to the grantors. Subsequent to the latter conveyance, Webber obtained a judgment against Johnston, reestablishing an unrecorded deed from the latter to the former, conveying the interest in the Waters Mine attempted to be assigned by Howard to Johnston on the certificate of sale, and which had been lost by Webber. The date of this deed appears to have been March 6, 1894.

The first question presented to this court, and argued by appellant in his brief, is, Was the sale to Howard, under the execution proceedings had under Owens's judgment, valid? The judgment under which the execution issued was rendered on the 7th of September, 1892. In making the levy the sheriff, after reciting the issuance of the execution under this judgment, certified that he "levied upon all the right, title, and interest of H. A. Owens, and all the right, title, and interest which the said H. A. Owens had on the 15th day of January, 1891, being an undivided one-third interest, more or less, of, in, and to the Waters mining claim." In the notice of sale given by the sheriff under the levy appeared the recital that the officer had "levied upon the following described real

estate, to wit: All the right, title, and interest which the said defendant Owens had on the 15th day of January, 1891, or now has, of, in, and to an undivided one-third interest in the Waters mining claim," etc. Again, in the certificate of sale to Howard, the officer recites that, under and by virtue of an execution in the case of John Howard against H. A. Owens et al., he was commanded to satisfy the judgment out of the personal property of the defendants, and if sufficient property could not be found, "then out of the real property belonging to the said defendant on the 15th day of January, 1891, or at any time thereafter"; and it further recited that, under said writ of execution, he had levied upon "all of the right, title, and interest of the defendant H. A. Owens, being an undivided one-third interest, more or less, of, in, and to the Waters mining claim," etc. It is urged by the appellant that it appeared from these recitals that the interest seized under execution and sold was not the interest which Owens possessed at the time of the issuance of the execution,—to wit, September 9, 1892,—but the interest which he had on the fifteenth day of January, 1891. There is nothing in these recitals which, in our judgment, renders the sale invalid. While the attempt was evidently made by the sheriff, under his evident misunderstanding of the execution, to levy upon the interest of Owens in the Waters mining claim possessed by him on the fifteenth day of January, 1891, yet the officer was careful to levy upon the interest of Howard possessed by him at the date of the levy; and the subsequent recitals in the notice and certificates of the sheriff were sufficiently guarded in this respect to render the sale effective to pass title to the interest held by Owens, the judgment debtor, at the time of the levy of the execution.

The next question presented by the record is whether Brown & Kastner, at the time they obtained their conveyance from Owens, dated April 18, 1894, had constructive notice of the sale to Howard under the execution proceedings. The certificate of sale was filed but not recorded. Section 19 (subd. 3) of the Execution Law of 1889, approved March 20, 1889, provides that "a duplicate of such certificate must be filed by the selling officer in the office of the county recorder of the county." There is no provision of the statute which requires the certificate to be recorded. The filing, therefore, of such

duplicate in the county recorder's office is made constructive notice of the sale to subsequent purchasers; and Brown & Kastner, in taking their deed from Owens, must be held to have had constructive notice of the sale to Howard. The sale of Owens's interest to Howard under the execution proceedings being valid, and Brown & Kastner having constructive notice of the same at the time they obtained the conveyance from Owens, the question therefore narrows down to the inquiry as to whether or not Brown & Kastner, at the time they obtained the conveyance from Howard and Johnston dated May 17, 1894, had constructive or actual notice, or such notice as to put them upon diligent inquiry of the title obtained by Webber through his deed from Johnston and the conveyance from the sheriff. The court below held that the facts did not show that Brown & Kastner had constructive knowledge of Webber's title, or had such actual knowledge as to put them upon notice of the true state of the title, and that they must therefore be deemed to be innocent purchasers, and to have acquired a good title as against the undisclosed title of Webber. Unless, therefore, an examination of the record by this court discloses that the findings of the court below and its judgment are manifestly against the weight of evidence, under the well-settled rule in such cases, we are not privileged to disturb these findings or to reverse the judgment.

Appellant does not contend that Brown & Kastner had constructive notice of the deed from Johnston to Webber, or of the deed from the sheriff to Webber; but it is contended that the circumstances connected with their obtaining a deed from Howard and Johnston put them upon notice of Webber's title. These circumstances, as they appear in evidence, are as follows: It appears that on the 17th of May, 1894, Brown & Kastner had bonded their interest in the Waters Mine to one Chauncey D. Clark; that C. F. Ainsworth, Esq., was on that date in Prescott, as the agent and attorney of Clark, conducting the negotiations of sale; that an abstract of the title to the mine was shown him, which did not contain any reference to the certificate of sale; that after being shown the abstract he visited the recorder's office, for the purpose of verifying the same, and was then shown the certificate of sale by the recorder; that immediately he sought Johnston, and found him and Kastner on the street, and called their

attention to the fact of the certificate and Howard's indorsement thereon. What was said and done at this interview and immediately thereafter was testified to by Ainsworth, Kastner, and Johnston. Ainsworth stated that he then informed Johnston that he had found the certificate of sale, and had noted the indorsement of Howard's transferring the three-fourths interest to him; that thereupon Johnston said, "I don't claim anything by that certificate. I never did, and I don't now"; that he thereupon suggested to Johnston that if he would quitclaim to Kastner the defect in the title would be cured; that Johnston then said, "I am willing to do it, and will do it right now. If you will prepare a deed, I will sign it"; that he (Ainsworth) then said, "That will cover your interest, and, as to Mr. Howard's interest, we will try and arrange that with Howard"; that thereupon a typewritten deed was drawn up in the office of Herndon & Norris; and that Kastner, then took the same, and returned with it, signed by Howard and Johnston, and drawn to Chauncy D. Clark; that the reason the deed was made to Clark was, that as the title was going to Clark from Brown & Kastner, under their agreement, the necessity for two conveyances was thus saved; that when the deed was handed to him the name of John Howard had been added as one of the grantors, and there had been written in the words, "it being understood that said T. W. Johnston claims no interest in said mining claim, and only signs and executes this deed to clear the title thereof of any real or imaginary cloud upon the title." Kastner testified that he was present at the conversation had between Ainsworth and Johnston, and that Johnston in that conversation had stated that he had no interest in the property, and never claimed any, and had said, "If you will make out a deed, I will go and sign it"; that after the deed was prepared he took it to Johnston's office, and there met Howard and Johnston; that he then paid to Howard one hundred and fifty dollars, and the deed was then signed by Howard and Johnston, and delivered to him; that he knew nothing of the certificate of sale or of Howard's indorsement thereon, and did not know that Johnston had any interest in the property, or had had any interest in the same, and that he did not read the deed, and did not see what the reading was upon the face of it; that Mr. Johnston had told him nothing about hav-

ing transferred an interest to Webber, but had said: "Go and get any paper that you want me to sign,—anything that you want me to do. Just get Herndon and Ainsworth to prepare it, and I will sign it." T. W. Johnston testified that his recollection of what transpired at the interview with Ainsworth connected with the making of the deed was somewhat vague and indefinite; that Kastner came to his office, remained probably one or two minutes, and that he said that "he wanted to know if I had any interest in the Waters Mine. 'No.' He said that he had run across some sort of an obstacle in the way, affecting the title, which was of a character that indicated that I had some interest in this property; and he asked if I claimed any interest in it." "I said that I had the impression that I had no interest in it. That is the impression that I now have of what I said. He left my office, and came back, and said— He asked me if I would make a deed. I have the impression—it is only an impression—that I said to him, 'I don't own anything to make a deed to.' " "Then something was said about my putting that statement in writing. I do not remember the details of that, but I do remember that I reached for my pad which I keep on my desk and wrote a little memorandum in pencil. I think that statement about my putting that in writing was accompanied by a statement of something of this character: That he said that they bet I would not put that in writing. Who 'they' were, of course, I don't know. I have a right to conjecture nothing, and I have no knowledge. I immediately took the pad. I said on that pad, as I remember it,—I have not seen that paper since,—substantially, I think, that I had no interest in this property; something of that kind. I have never seen the writing since. He took that,—he left,—as I remember it. He came back shortly afterwards, and said, 'You make a deed.' I recollect of saying substantially this: 'I will do anything that you require of me, consistent with propriety, that will advance your interests, or enable you to perfect this trade,'—whatever it was, the details of which, as I have stated before, I did not know then, and do not now. He went out again and he again returned, and presented me this paper. I read this over hastily. Then wrote what you see here in ink, intending to indicate there what I had indicated in this note, what I had substantially said, as I remember it." "Then

Mr. Kastner said that 'this thing affects John Howard likewise. Don't you think you can get for me, or for somebody,'—Mr. Clark, I suppose; I do not remember those names at all; I would not know who it was but for this paper,—'don't you think you can get for me a deed to John Howard's interest?' I said, 'Yes, sir; I think so.' 'Are you willing to try?' I said, 'Yes, sir.' He says, 'I will give you twenty-five dollars if you see him, and induce him to make me, or somebody, a deed to this interest.' I went downstairs, and met John Howard within five minutes; and the result of my conversation with John Howard was, that he came up in my office, and, without reading this deed with any care, I put his name in it, and he signed it. I do not think Mr. Kastner was present. He was present during a part of my talk with Judge Howard at the foot of the stairs. I think Judge Howard and myself were alone in my office. The price agreed on was one hundred and twenty-five dollars, I think. Kastner said he did not have one hundred and twenty-five dollars, and asked me to give Howard my check, which I did, and which money, of course, he promptly returned to me. That is the substance of this transaction, as I recall it. There might have been other details. If I omit anything anywhere, I will try and refresh my memory." "Now, my recollection about that is this: It was not clear in my mind then, really, as to whom I had conveyed this property,—my interest in this property; whether it was Shirley or Webber, or Shirley and Webber. I did not then know, and did not know until I was convinced afterwards, that it was Webber; but I had a very distinct impression that I had no interest in this property, because I had conveyed it to some one; and I am forced to say, with reluctance, that I have the impression,—telling you frankly, my memory is not a good memory,—I have the impression that I stated that I had conveyed this property, or sold it. I do not know whether I said I made a deed to it, or what. I know I sought to create the impression that I had no interest in it, and this sort of way. But those conversations— They were n't two minutes long. They were hurried. I was busy." "This man was evidently engaged in his own transaction. He ran into my office, said so and so and left. This occurred about five times. There was absolutely no coherency about it, so far as I was concerned." "In that connection, I saw Mr. Ains-

worth since I left the courtroom, and he told me in a conversation I had with him— If you had asked me whether I had ever said anything on this subject to Mr. Ainsworth before, I should have said emphatically, 'No.' I now know his recollection is better than mine. I will tell you of that, and shall illustrate to you the lack of reliability of my memory about material matters, where I feel no interest or especial concern. I would have sworn, if you had asked me this morning, that I never mentioned the subject in my life to that gentleman. I am convinced now I said to him substantially, about the same day, before, possibly, I had any talk with Mr. Kastner, that I had no interest in this property, or 'claimed no interest,' was what I said. That is my best recollection." Mr. Johnston's recollection being at fault as to just what was said concerning his conveyance to Webber during his interviews with Kastner, or whether anything was said upon that subject, there is no sufficient evidence to overcome Kastner's unequivocal testimony that nothing was said which gave him any intimation that Johnston had previously parted with his title in the Waters Mine to Webber, or to any one else. He was put upon inquiry, doubtless, to investigate the matter diligently and in good faith. To what extent Kastner was bound to carry his inquiries must be determined from the nature of the case.

The records fail to show that any sheriff's deed had been made under the certificate of sale, though the time for redemption had long since expired. It would scarcely occur to the ordinarily prudent man that one would purchase such a title as that possessed by Johnston, and yet suffer the title to remain so incomplete and the record silent as to his connection with this title. Considering, therefore, the state of the title as it existed, under the positive testimony of Kastner that he was not made aware by any declaration of Johnston that the latter had parted with his interest, and the imperfect recollection of Johnston as to what occurred during his interviews with Ainsworth and Kastner, we cannot say as a matter of law that the court below erred in finding, as it necessarily must have done, that Brown & Kastner were innocent purchasers for value of the interest obtained by Howard under his sheriff's sale, and transferred to Johnston by the indorsement appearing thereon. Even were we of the opinion that

this finding was not supported by the weight of evidence, we could not disturb it under the existing rule governing appellate courts, unless the preponderance of evidence against the finding be so marked that no reasonable view of the testimony can be taken which will support it; and we think that a reasonable view of the testimony can be taken which will support the contention of the appellees that they are innocent purchasers for value. The judgment is therefore affirmed.

Street, C. J., Davis, J., and Doan, J., concur.

[Civil No. 574. Filed April 16, 1898.]

[52 Pac. 986.]

JOHN M. MCGOWAN, Plaintiff and Appellant, v. NELLIE
A. SULLIVAN, Defendant and Appellee.

1. JUDGMENT—FINDINGS—GENERAL IN FAVOR OF DEFENDANT—LAWS 1897, ACT NO. 22, CONSTRUED—DAGGS v. HOSKINS, ANTE, P. 300, FOLLOWED.—A judgment based upon general finding of the issues in favor of the defendant is valid under the statute, *supra*. *Daggs v. Hoskins*, *supra*, followed.
2. APPEAL AND ERROR—REVIEW—CONFLICT IN EVIDENCE.—Where the evidence is conflicting, and this court cannot say it fails to support the judgment, the judgment will be affirmed.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Graham. Owen T. Rouse, Judge. Affirmed.

The facts are stated in the opinion.

E. J. Edwards, and John McGowan, for Appellant.

Moorman & McFarland, for Appellee.

The judgment will not be disturbed on appeal if there is any evidence to support the judgment. *Marganthau v. King*, 15 Colo. 413, 24 Pac. 1048; *Mackey v. Briggs*, 16 Colo. 143, 26 Pac. 131; *Miller v. Potoshinsky*, 1 Colo. App. 32, 27 Pac. 17; *Young v. Aguaria*, 90 Cal. 175, 27 Pac. 72.

DAVIS, J.—This was an action to recover upon a *quantum meruit* for professional services alleged to have been rendered by the appellant to the appellee as an attorney and counselor at law. The complaint alleges the reasonable value of the services to be five hundred dollars, avers a credit and payment of one hundred and seventy dollars thereon, and asks a judgment for the balance of three hundred and thirty dollars. The answer is a general denial. The case was tried before the lower court, sitting without a jury. Judgment was rendered in favor of the appellee for her costs, and from this judgment McGowan has appealed.

It is urged as ground for reversal that the lower court failed to state its findings of fact and conclusions of law. The transcript shows a general finding upon the issues in favor of the defendant (appellee), and we have already held in the case of *Daggs v. Hoskins*, ante, p. 300, (decided at the present term,) 52 Pac. 357, that a judgment based upon such a finding is valid, under the act of the legislature approved March 16, 1897, (Acts 1897, No. 22). The evidence in this case is conflicting upon the question of the rendition of the services to the defendant and as to their value. We cannot say that it fails to support the finding and judgment of the trial court. The record discloses to us no reversible error, and the judgment is affirmed.

Street, C. J., Sloan, J., Doan, J., concur.

[Civil No. 594. Filed April 16, 1898.]

[52 Pac. 777.]

LUTHER WILSON, Plaintiff and Appellant, v. JAMES R. LOWRY et al., Defendants and Appellees.

1. PLEADING—PLEA IN BAR—JUDGMENT ON DEMURRER—WHEN GOOD.—
A final judgment on a demurrer to a complaint can be pleaded in bar of a subsequent action between the same parties only when the demurrer went to the merits and cause of action is the same.
2. SAME—SAME—JUDGMENT ON GENERAL DEMURRER—ADDITIONAL MATERIAL ALLEGATIONS—CHANGE IN CAUSE OF ACTION.—Where judgment is entered upon a general demurrer that the complaint does not state facts sufficient to constitute a cause of action, such judgment

is not a bar to a subsequent action between the same parties, the complaint alleging substantially the same facts, but adding material averments wanting in the original complaint, as such averments change the cause of action.

3. **EXEMPTIONS—PERSONAL PROPERTY—MONEY DERIVED FROM INSURANCE ON REAL PROPERTY.**—Money received from an insurance policy on real property is personal property under the exemption laws of this territory.
4. **PERSONAL PROPERTY—DEFINED—STATUTORY CONSTRUCTION—REV. STATS. ARIZ. 1887, PAR. 2932, CITED.**—In the rules prescribed for the construction of the statutes of this territory, the words "personal property" are defined to include money, goods, chattels, things in action, and evidences of debt. Statutes, *supra*, cited.
5. **EXEMPTIONS—CONSTRUCTION OF STATUTES.**—Laws exempting property from execution for the payment of debts are to be liberally construed.
6. **SAME—RIGHT TO CLAIM—GARNISHMENT—FAILURE TO PLEAD EXEMPTION.**—Personal property exempt from execution can be claimed and designated at any time prior to its sale and conversion by the officer holding the execution, and failure of the claimant to protect his rights in garnishment proceedings or of garnishees to set up such exemption, is not conclusive of his rights, and he may still claim and designate the exemption so long as the money remains in the hands of either the garnishee or the officer.
7. **SAME—OFFICE AND OFFICERS—SHERIFF—FAILURE TO RELEASE EXEMPT PROPERTY—LIABILITY—SURETIES.**—Failure of a sheriff to release exempt property upon a proper demand is a violation of official duty for which he and the sureties upon his official bond are liable.
8. **SAME—SAME—SAME—CLAIM OF EXEMPTION—REV. STATS. ARIZ. 1887, TIT. 27, CITED.**—Upon a proper demand for release of property exempt from execution, it is the duty of the sheriff to proceed under the statute, *supra*.
9. **OFFICE AND OFFICERS—SHERIFF—EXEMPTION—FAILURE TO PAY OVER MONEY EXEMPT—LIABILITY—REV. STATS. ARIZ. 1887, PAR. 502, INAPPLICABLE.**—The statute, *supra*, authorizing the recovery of money, with twenty-five per cent damages and ten per cent per month interest, from a sheriff into whose hands money has come by virtue of his office, and who neglects or refuses on demand to pay over the same to the party entitled thereto, is inapplicable to a case where a sheriff refuses to pay over on demand money exempt from execution, held under garnishment.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Yavapai. J. J. Hawkins, Judge. Reversed.

The facts are stated in the opinion.

James H. Wright, for Appellant.

The appellees interposed a plea of *res adjudicata*, and at the trial put in evidence therein the complaint, answer, judgment, and *remittitur* of the supreme court showing the affirmance of the judgment of the court below on the general demurrer in case No. 2242. How that judgment can be claimed as an adjudication of the merits of the case is not clear. A former judgment on a general demurrer is not a bar, if additional facts in the new complaint complete a cause of action. The court below so held, and overruled their plea of *res adjudicata*. *Wetherbee v. Carroll*, 33 Cal. 556; *Terry v. Hammonds*, 47 Cal. 32; *City of Los Angeles v. Mellus*, 59 Cal. 444; *Morrell v. Morgan*, 65 Cal. 575, 4 Pac. 580; *Gerrish v. Bunker*, 6 Minn. 14.

A former judgment must have been upon the merits. A judgment on defective pleadings will not do; it is not *res adjudicata*. *Barnes v. District of Columbia*, 91 U. S. 546; *Evansville v. Crawfordsville R. R. Co.*, 19 Ill. 207.

Herndon & Norris, for Appellees.

"A demurrer to a complaint because it does not state facts sufficient to constitute a cause of action raises an issue which, when tried, will finally dispose of the case as stated in the complaint on its merits, unless leave to amend or plead over is granted." *Alley v. Nott*, 111 U. S. 472, 4 Sup. Ct. 495; *Scharff v. Levy*, 112 U. S. 711, 5 Sup. Ct. 360; *City of Aurora v. West*, 7 Wall. 107.

"If a demurrer to a complaint is sustained, and plaintiff fails to either amend or appeal, he is debarred of a second action." *Bomar v. Parker*, 68 Tex. 435, 4 S. W. 599.

The property destroyed had not been claimed as a homestead, and was therefore subject to attachment for debt. Rev. Stats., par. 2084.

The money due upon adjustment for the loss represented the destroyed property, and should for the purposes of this case be governed by the same rule. *Howes v. Lathrop*, 38 Cal. 493.

The converse of the proposition is true. *Houghton v. Lee*, 50 Cal. 101; *Cameron v. Fay*, 55 Tex. 58.

DAVIS, J.—This was an action by the appellant to recover against James R. Lowry and the sureties upon his official bond as sheriff of Yavapai County. The complaint sets forth, in substance, that Wilson was the head of a family in said county and territory, having two children of tender years wholly dependent on him for their support; the election and qualification of Lowry as sheriff; the execution and form of his official bond, conditioned that Lowry "shall well and faithfully in all things perform and execute the duties of said office of sheriff . . . that are now required by law, or that may be required by any law which may be enacted . . . during his continuance in office, without fraud, deceit, or oppression, and shall pay over all moneys that shall come into his hands as such sheriff"; that in certain suits against Wilson by creditors, which had proceeded to judgment against him, there was collected by Lowry, as sheriff, from the Prussian National Insurance Company and the Niagara Fire Insurance Company, debtors of Wilson, the sum of \$529.46, by execution and garnishment process; that prior to the service of said process appellant duly filed with the said Lowry, as sheriff as aforesaid, a notice that he was the head of a family, that said money then in the hands of said insurance companies was all the personal property that he owned, and that he designated and demanded the same as exempt to him from garnishment, execution, and forced sale; that immediately after the said money came into Lowry's possession, by virtue of said process, the appellant again filed with him an express, distinct, and formal demand for the same, claiming and designating it as exempt and reserved to him (appellant) as the head of a family, but that the said sheriff, in violation of his duty as such under the laws of this territory, has failed and refused to pay over to appellant the amount so collected, whereby he claims the appellees have become liable to him for the said amount, together with twenty-five per cent thereof as additional damages, and interest on said sum of \$529.46, at the rate of ten per cent per month, being the penalties mentioned in paragraph 502 of the Revised Statutes. Besides a general demurrer, which was overruled by the lower court, the appellees answered, alleging that in a former suit in the same court between the same parties the same cause of action was litigated, a judgment rendered in favor of these appellees,

which judgment was on appeal affirmed by this court, and that the same constitutes a bar to the pending action. Their further answer is a general denial. The case was tried before the lower court, sitting without a jury, and resulted in a judgment for the appellees. From the judgment and the order of the court overruling his motion for a new trial, Wilson has appealed. The appellant contends that there was no evidence to support the finding and judgment as rendered, and that, upon the facts as alleged and proven, he was entitled to recover.

It is provided in paragraph 1956 of title 27 ("Exemptions") of the Revised Statutes, that "there shall be reserved to every family exempt from attachment and execution and every species of forced sale for the payment of debts, personal property not to exceed in value the sum of one thousand dollars." The succeeding paragraphs of the same title provide that the head of the family entitled to such exemption shall designate the personal property which he claims as exempt, not exceeding said value, and prescribe the duties of the officer holding the execution, and the proceedings to be had in case the defendant fails to make the designation himself, or there is a disagreement as to value, etc. On the trial of the case in the court below the following facts were either admitted or conclusively established by testimony that was not controverted in the slightest particular: That ever since the commencement of the creditors' suits Wilson had continuously resided in Yavapai County, Arizona, and been the head of a family; that the sum of \$529.46 was collected from the said insurance companies by Lowry, as sheriff, through execution and garnishment process in said creditors' suits; that this money was the property of Wilson, due to him from the adjustment of insurance upon his house which had been destroyed by fire; that the total amount of the insurance due to him from the companies was \$850, and that he was not the owner of any other personal property; that no notice of said garnishment proceedings had been given to Wilson, but that his counsel appeared for him on the day when the default judgments were rendered against the garnishees, and protested against the entry of the same; that prior to the service of the process through which the said sum of \$529.46 came into the possession of Lowry, as sheriff, and again after the

money came into his hands, appellant served upon said sheriff an express, distinct, and formal demand for the same, claiming and designating the said money as exempt and reserved to him as the head of a family; that these notices were in writing, and their service was admitted; that the sheriff refused to pay over said money to the appellant, and in making return upon his writs of the collection and payment thereof to the execution creditors recites that prior to and before receiving said money Luther Wilson, defendant (appellant), served written notice upon him, claiming the same as his property, and exempt from execution, but that he paid out the money in pursuance of the writs after taking indemnity bonds, etc. There was introduced in evidence by the appellees, in support of their plea of *res judicata*, the record of a former suit between these same parties, in which a general demurrer to the complaint had been sustained, and, appellant refusing to amend, judgment had been entered in favor of appellees, which, on appeal, was affirmed by the supreme court. As against the appellant's right to recover, and in support of the judgment rendered in the court below, counsel for appellees urge the following propositions: First, that the former action was identical with this and for the same subject-matter, and that the judgment therein rendered was a final and conclusive adjudication of the matters involved in this case; second, that the property insured was real estate, and not exempt, and that the money obtained from the adjustment for its destruction should therefore, for the purposes of this case, also be treated as realty, and not be exempt; third, that the appellant appeared in defense of the original garnishment proceedings against the insurance companies, claiming the money in controversy, and should have appealed from, or taken steps to set aside, the judgments there entered against the garnishees; fourth, that it was the duty of the garnishees to have answered and claimed appellant's exemption, if he was entitled to any; fifth, that the provision of the law (Rev. Stats., par. 502) authorizing the recovery of money, with twenty-five per cent damages and ten per cent per month interest, from a sheriff into whose hands money has come by virtue of his office, and who neglects or refuses on demand to pay over the same to the party entitled thereto, is inapplicable to the case at bar.

We will consider these propositions in their order. Whether a final judgment for the defendant, rendered on a demurrer to the complaint, can be pleaded in bar of a subsequent action between the same parties depends, first, on whether the demurrer went to the merits of the action; and second, whether the cause of action is the same. If either of these conditions be wanting, the judgment on demurrer does not bar another action. The demurrer in the original suit was on the ground that the complaint did not state facts sufficient to constitute a cause of action, and therefore went to the merits. The complaint in the present is substantially the same as in the former action, with the exception that in this case it is averred that at the time when the cause of action accrued appellant was the head of a family in the county of Yavapai, territory of Arizona. This is a material averment, and its absence from the first complaint is probably the ground upon which the demurrer was sustained. The causes of action are therefore not the same. The former adjudication determined no more than that the pleading, as presented, was insufficient; that the facts therein stated did not constitute a cause of action; not that the appellant had no cause of action. Therefore, we say, both upon reason and authority, that the appellant having failed on demurrer in his first action from the omission of an essential allegation in his complaint, which is fully supplied in the second suit, the judgment in the first suit is no bar to the second, although the respective actions were instituted to enforce the same rights. *State v. Cornell*, 51 Neb. 553, 71 N. W. 300; *Moore v. Dunn*, 41 Ohio St. 62; *Stowell v. Chamberlain*, 60 N. Y. 272; *Terry v. Hammonds*, 47 Cal. 32.

Upon the second proposition urged by appellees we consider it wholly immaterial whether the building was real estate or not. When it was destroyed by fire, the insurance claim and the insurance money became personal property. It is true that courts of equity sometimes treat money as standing in lieu of real estate, but the principles upon which this is done are not at all applicable to this case. In the rules prescribed for the construction of the statutes of the territory, the words "personal property" are defined to include money, goods, chattels, things in action, and evidences of debt. Rev. Stats., par. 2932.

The third and fourth grounds relied upon to sustain the judgment may be treated together. It is the well-settled

policy of the courts to liberally construe those humane and beneficent provisions of the law exempting certain property from execution for the payment of debts. The state has an interest in protecting families, and especially helpless children, against pauperism, and securing to them the means of reasonable comfort and education. The personal property exempt to every family by paragraph 1956 of the Revised Statutes can be claimed and designated at any time prior to its sale or conversion by the officer holding the execution. Any other construction would tend to defeat the beneficent policy of the statute. While the appellant's exemption rights might perhaps have been successfully maintained by appeal or otherwise in the garnishment proceeding, to which he was not a party, and while it was the privilege, and possibly the duty, of the garnishees to have set up by answer that the property was exempt, if they had knowledge of the fact, the appellant's failure to obtain the benefit of either course was not conclusive of his rights. There was still reserved to him the privilege of claiming and designating the exemption of the insurance money so long as it was yet in the hands of either the garnishees or the sheriff, and upon demand being properly made, as in the case at bar, it was the duty of the officer to have proceeded in accordance with the provisions of title 27. His failure to do so was at his peril. The undisputed evidence in this case shows that at the time when the sum of \$529.46 was in the hands of Lowry, as sheriff, under the process, and the demand was made therefor by Wilson, the latter was the head of a family and entitled to said money as his exemption. The peremptory refusal of the sheriff to pay the same to him was a violation of his official duty. It has been repeatedly held that the sureties upon the official bond of a sheriff, conditioned for the faithful performance of the duties of his office, are liable for his acts in seizing upon a writ of attachment property of the debtor which is exempt and refusing to release it upon demand of the debtor. The act, although unlawful, is one done by the sheriff under color and by virtue of his office, and constitutes a breach of the condition of the bond. *Hursey v. Marty*, 61 Minn. 430, 63 N. W. 1090; *State v. Jennings*, 4 Ohio St. 418.

Upon the final proposition we quite agree with counsel for appellees that the provisions of paragraph 502 of the Revised

Statutes have no application to the case at bar, and that the appellant could not, in this action, recover the penalties therein provided. We hold, however, that the complaint states a good cause of action for a recovery against the appellees to the extent of \$529.46 and interest for the breach of the condition of the official bond, and that under the law and the evidence a judgment for that amount should have been rendered by the lower court. The judgment will be reversed and the cause remanded, with directions to enter judgment in appellant's favor for the sum of \$529.46, with interest from February 8, 1894, at the rate of seven per cent per annum, and for costs of suit.

Street, C. J., Sloan, J., and Doan, J., concur.

[Civil No. 608. Filed April 16, 1898.]

[52 Pac. 1118.]

J. E. GATES, Plaintiff and Appellant, v. R. H. FREDERICKS et al., Defendants and Appellees.

1. MECHANICS' LIENS—PRINCIPAL AND AGENT—EVIDENCE OF AGENCY—EXCEPTIONS—REV. STATS. ARIZ. 1887, PAR. 2258 ET SEQ. AND PAR. 2260, CITED AND CONSTRUED.—Agency in the matter of a contract for material and labor so as to bind the premises upon which it is placed under the Mechanic's Lien Act (par. 2258 et seq., *supra*) must be shown to exist as is required in other cases of agency, with the modification, however, which the statute (par. 2280, *supra*) makes,—to wit, that contractors, subcontractors, architects, and builders shall be the agents of the particular people for whom they act; and that the persons who have the charge or control of mines, mining claims, canals, etc., shall be regarded as the agents of the owners in and about the particular premises.
2. SAME—LANDLORD AND TENANT—PRINCIPAL AND AGENT—LESSEE NOT AGENT FOR LESSOR SO AS TO BIND LESSOR'S ESTATE FOR REPAIRS ORDERED BY LESSEE.—There is no statute nor principle of law which makes a leaseholder the agent of his lessor to hold the lessor or his estate in the property responsible under the Mechanic's Lien Act for material or labor furnished the leaseholder.
3. SAME—SAME—SAME—EVIDENCE OF AGENCY—INSUFFICIENT TO BIND LESSOR'S ESTATE.—Where lessees of a building spoke to appellant,

a contractor, about some proposed repairs thereon, and said that they intended to speak to the owners of the building about it, and that afterwards said lessees told him he might go ahead and have the work done; that the lessors had said that the lessees would be allowed credit on their rent, such facts are insufficient to constitute the lessees agents of the lessor for the purpose of binding the lessor's estate for such repairs under the Mechanic's Lien Act, particularly where the owners testify that they had never authorized the lessees to have the work done.

4. SAME—SAME—LABOR ON PERSONAL PROPERTY OF LESSEES NOT CHARGEABLE AGAINST ESTATE OF LESSOR—REV. STATS. ARIZ. 1887, PAR. 2258, CITED AND CONSTRUED.—Work done by a contractor upon a bar, back bar, and screen which are the personal property of the lessees of a building cannot be charged against the real estate or the estate of the lessor in the property, under paragraph 2258, *supra*, which provides that any person who may labor or furnish material to erect any house or improvement or to alter or repair any building or improvement whatever shall have a lien on such house, building, fixtures, or improvement, and shall also have a lien on the lot or lots of land necessarily connected therewith to secure the payment therefor.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Yavapai. John J. Hawkins, Judge. Affirmed.

The facts are stated in the opinion.

T. W. Johnston, for Appellant.

The following authorities are cited on the proposition that appellant is entitled to a lien on this property: *Eaman v. Bashford*, 4 Ariz. 199, 37 Pac. 25; *Collins v. Cowan*, 52 Wis. 634; *Hill v. Gill*, 40 Minn. 441, 42 N. W. 294; *Paulsen v. Menske*, 126 Ill. 72, 18 N. E. 275; *Cady v. Case*, 11 Wash. 124, 39 Pac. 375; *Kremer v. Walton*, 11 Wash. 120, 39 Pac. 374; *Reilly v. Stephenson*, 62 Mich. 509; *Church v. Garrison*, 75 Cal. 199, 16 Pac. 885; *Moore v. Jackson*, 49 Cal. 109; *Otis v. Dodd*, 90 N. Y. 336.

Herndon & Norris, for Appellees.

The case of *Johnson v. Dewey*, 36 Cal. 623, is very strong against the position taken by appellant. In that case S. was the tenant of D., and desired, for his own benefit, that the house should be raised and improved, and was willing to

pay the cost, provided D. would consent and extend his lease for six years and advance him three thousand dollars, in consideration of which advance S. would pay fifty dollars per month more rent than he was paying. D. assented, and S. proceeded to raise the house. Johnson put in the lowest bid and obtained the contract. The court held that the lien which plaintiffs acquired, if any, was not upon the interest of D., the owner, but upon the interest of S., the lessee. The contractor acquired no right of action against the owner nor any lien upon his interest in the property. See, also, *Hayes v. Fessenden*, 106 Mass. 228.

STREET, C. J.—R. N. Fredericks, A. J. Herndon, and Jane Jackson are the owners of lot 24 in block No. 13 in the city of Prescott, Arizona, on which is situated a building used for business purposes. William Mehan and John Coyle engaged in business in said city in 1895 under the firm name and style of Mehan & Coyle, and conducted a saloon on said premises under a lease which they held from the owners. On the first day of November, 1895, Mehan & Coyle leased said premises from the appellees for the term of two years, paying a monthly rental of ninety dollars per month, and went into possession of the premises. They employed the plaintiff Gates, to fix up for them in the building a bar and back bar and screen, and afterwards they had some work done on the building itself in fixing the roof, and strengthening the floor, and putting on baseboards. The contract price for the bar and back bar was \$210, and the whole amount of work done by plaintiff for Mehan & Coyle amounted to \$324.14. The bar, back bar, and screen were no part of the building. After appellant had completed all the work he undertook to perfect a mechanic's lien upon the building and lot, and, to accomplish that purpose, filed in the recorder's office of Yavapai County his itemized and attested account under paragraph 2258 of the Revised Statutes of Arizona, which showed a balance due of \$197.64, and brought this action in the district court against these appellees to foreclose the lien, seeking to hold their property for the payment of that amount. William Mehan and John Coyle were joined in the action as co-defendants with these appellees. On the twenty-first day of December, 1896, judgment was rendered in said district court against Mehan

& Coyle for the sum of \$197.64, with interest and costs; and it was further ordered, adjudged, and decreed by the court that plaintiff do not have a mechanic's lien for the amount above found to be due him, or for any other sum, upon the premises described in his complaint, being the property of the defendants Fredericks, Herndon, and Jackson, and that defendants be dismissed, with the costs by them expended. From the judgment and decree dismissing appellees the appellant brought this appeal.

The question for this court to determine is whether under the evidence the court erred in its judgment that the plaintiff had no lien against the property of the owners. Paragraph 2258 of the Revised Statutes of Arizona is as follows, to wit: "That any person or firm, lumber dealer, artisan or mechanic who may labor or furnish material, machinery, fixtures or tools to erect any house or improvement, or to alter or repair any building or improvement whatever, shall have a lien on such house, building, fixtures or improvements, and shall also have a lien on the lot or lots of land necessarily connected therewith, to secure the payment for labor done, lumber, material, machinery or fixtures and tools furnished for construction, alteration or repairs." The appellant seeks to hold the property of appellees liable for the debt under the theory that Mehan & Coyle were acting as the agents of the owners of the property, and were such agents as is prescribed by the statute; and further seeks to hold the appellee Fredericks alone as to his interest from a direct contract which they claimed Fredericks entered into with the appellant for the work that was to be done upon the building itself. The statute prescribing liens for mechanics, laborers, and others in several places uses the word "agent." For instance, in paragraph 2260, where it directs a service of the account upon the party owing the debt, it says, "It may be furnished to the party owing the debt or to his agent," using the word "agent" in connection with the owner or debtor. Again, when service is to be had upon the owner or debtor (paragraph 2280): "The word 'agent,' as used in this act, shall be construed to include all contractors, subcontractors, architects, builders; and persons who have the charge or control of any mine, mining claim, canal, water-ditch, flume, aqueduct, reservoir, fence, bridge, mill, factory, hoisting works or other property or thing upon

which labor has been performed or material furnished." This court, in the case of *Eaman v. Bashford*, reported in 4 Ariz. 199, 37 Pac. 24, held that where the owners of a mine had leased the mine with a contract that the lessee might operate the mine and extract ores, with the privilege of buying the mine, the mine was subject to a lien of the miners and others doing work on the mine for the lessees while operating the mine under such contract. This court there says: "It is clear that the mining and reduction of ore, the timbering of mines, and repairing of the mill were directly contemplated by the parties at the time of the execution of the instrument. The appellant, the owner of the mine, was to be benefited in either event, for, if the lessee, who had a contract to purchase the mine, became the purchaser, or produced ore less than the cost of extraction and reduction, they were to be credited upon the purchase price; and, if he failed to become the purchaser, all payments were to be forfeited, and become the property of the owner, who was really more interested in the work than the lessee; that it was just that the property be held for the payment of supplies used by the lessee in prosecuting work, especially when it was stipulated that the owner should first pay the cost of its extraction and its reduction." That case was decided upon the principle that the lessee became the agent of the owner of the mine to work it, and it must have been contemplated that in the working of the mine he would be at an expenditure for miners' wages and other work in the development and extraction of the ore. The court in that decision cited the case of *Moore v. Jackson*, reported in 49 Cal. 109, wherein a mechanic's lien against the property was held good under circumstances where the lessee of the premises directly contracted with the lessor to do certain repairs upon the house and premises, and where it was expected that the repairs should be paid for by the lessor. Under such contract it was held that the lessee was the agent for the lessor, and, being his agent, the premises should be held for the labor and expenses of setting it up under the contract. It has often been urged that our statute is so broad in its terms that any person whatever furnishing material or doing labor at the instance of any person connected with the property might have a mechanic's lien upon the property, and that the statute is so broad as to make any one obtaining material for the premises or having

work done upon the premises the agent for the holder. Such argument reaches way beyond the purposes of the lien law. Agency, in the matter of a contract for material and labor, so as to bind the premises upon which it is placed, must be shown to exist as is required in other cases of agency, with the modification, however, which the statute makes,—to wit, that contractors, subcontractors, architects, and builders shall be the agents of the particular people for whom they act, and that the persons who have the charge or control of mines, mining claims, canals, etc., shall be regarded as the agents of the owners in and about the particular premises. But there is no statute, nor is there any principle which can be called into requisition, which makes the leaseholder the agent of the lessor. Parties furnishing material or doing labor for a leaseholder undoubtedly may have a lien against the particular estate of the leaseholder; but to hold the owner of the property responsible, and his estate in the property responsible, would be to put the landlord at the mercy of the tenant. Under such circumstances the tenant could make any kind of improvements at the expense of the property.

If we look at the evidence in this particular case, we will find that about the time appellant had completed the work on the bar, back bar, and screen for Mehan & Coyle they spoke to the appellant about some proposed work on the building, and said that they intended to speak to the owners of the building about it; that about two days thereafter they reported to the appellant that they had seen Fredericks, and before he would answer them he wanted to see his co-owners; that afterwards Mehan & Coyle told him he might go ahead and have the work done; that Fredericks had said he had seen his co-owners, and that they (Mehan & Coyle) would be allowed a credit on their rent of ninety dollars. This fact we regard as fairly proven. The evidence of the different witnesses puts some different construction upon it, but very slight, and no one goes so far as to show that the appellant had any direct contract with Fredericks or any of the owners. Fredericks in his evidence says that he had a conversation on November 7th with Gates, the appellant, and Gates asked him if Mehan & Coyle had a lease on the building, and he told him that they had. Gates said that he had done work for them, and that they had not paid him, and that he had a notion to

attach,—referring to the bar and back bar. He further says that, in referring to telling Mehan & Coyle to go ahead, Mehan & Coyle asked him to assist them, as they had been to a great deal of expense in fitting up the building. Fredericks said he would consult his co-owners about it, and did consult them, and they concluded that, as Mehan & Coyle were paying them ninety dollars a month, or fifteen dollars per month more than they were getting before, and in consideration of the fact that they had paid rent from the 1st of November, and had not entered into business until later, that they could well afford to give them the sixth month's rent free of charge, provided, however, that they paid the first five months' rent promptly, and Fredericks so informed Mehan & Coyle; that he never authorized Mehan & Coyle to have the work done, and made no arrangements about paying for the work. It is in evidence that Mehan & Coyle occupied the premises but a couple of months, or such a matter, and then left them; consequently the rent for the sixth month was not credited upon their account of rent. Under these circumstances it would be impossible for the court to have wisely concluded that Mehan & Coyle were the agents of the owners of the property in the repairs about the building and premises. The work done upon the bar, back bar, and screen, being the personal property of Mehan & Coyle, could not be charged against the real estate or the estate which the lessors held in the property. The judgment of the district court is affirmed.

Sloan, J., Doan, J., and Davis, J., concur.

[Civil No. 586. Filed April 16, 1898.]

[52 Pac. 985.]

WILLIAM CLARK, Defendant and Plaintiff in Error, v.
ROBERT E. MORRISON, Plaintiff and Defendant in
Error.

1. SUMMONS — SERVICE — DEFECTS — WAIVED BY ANSWER—REV. STATS. ARIZ. 1887, PAR. 721, CITED.—Defects in the manner of the service of summons are waived and cured by answer and appearance in the

trial court, under the statute, *supra*, providing that "the filing of an answer shall constitute an appearance of the defendant, so as to dispense with the necessity for the issuance or service of summons upon him."

2. EVIDENCE — JUDICIAL NOTICE — ATTORNEYS AT LAW — OFFICERS OF COURT.—Under our statute a lawyer may be an attorney and officer of the district court, and yet not be a member of the bar of the supreme court; and this court cannot take judicial notice of the officers of the district court.
3. SAME — PRESUMPTIONS — RECITALS OF JUDGMENT — ATTORNEYS AT LAW.—Where the record shows that an answer was filed below signed by attorneys for defendant, and the judgment recites that the defendant entered his appearance by filing his answer, the presumption is, that such attorneys were duly qualified and authorized attorneys of said court.

ERROR to the District Court of the Fourth Judicial District in and for the County of Yavapai. John J. Hawkins, Judge. Affirmed.

The facts are stated in the opinion.

E. M. Sanford, for Plaintiff in Error.

This court will take judicial notice of its officers and attorneys. *Alderman v. Bell*, 9 Cal. 315; *Masterson v. Le Claire*, 4 Minn. 108.

So it ought to be presumed that Vanatta & Cunningham are not licensed attorneys in Arizona. The paper called an answer, being a pleading, not signed by the party, nor by an attorney licensed to practice in Arizona, is not tantamount to an appearance.

J. E. Morrison, for Defendant in Error.

DAVIS, J.—The defendant in error brought an action in the court below against William Clark and H. J. Sisty, co-partners, under the firm name and style of Clark & Sisty, to recover the sum of \$1,006.13 for materials furnished and labor done in and upon two certain mining claims,—the Shelton and the Eureka,—situate in the Walker Mining District, Yavapai County, Arizona, and to enforce a lien therefor against said mining properties. The complaint alleges the said co-partners to have been the owners and in the possession of said

mining claims at the time of the improvements thereon, and avers that they are residents of the state of Colorado. The account consists of various items of labor alleged to have been performed, and materials to have been furnished, by different persons upon said mines and mining property, at the special instance and request of the said Clark & Sisty, and duly assigned to the defendant in error, by whom, the complaint avers, they were attested, filed, and recorded in compliance with the lien statute. Upon the filing of the complaint, summons was issued, and the same appears to have been served upon William Clark, personally, on May 19, 1896, in El Paso County, Colorado. No service was ever had upon H. J. Sisty. On June 23, 1896, what purports to be the separate answer of William Clark was filed in the case, signed by Vanatta & Cunningham, as his attorneys, and there is no contention that it was not done by his authority. The answering defendant admits that at the dates mentioned in the complaint he and his co-defendant were the owners of said mining claims; admits that there is due to the plaintiff upon the causes of action set forth in the complaint the sum of \$391.50, but no more; and "prays that plaintiff be allowed a judgment in the sum of \$391.50, and his reasonable costs." At the trial in the court below neither of the defendants appeared in person or by counsel. Evidence was introduced in the plaintiff's behalf, and the court found the allegations of the complaint to be true. A judgment was rendered against the defendant William Clark for the full amount claimed by the plaintiff, and a decree was entered directing the sale of said mining claims for the payment of said judgment. Clark, as plaintiff in error, brings the case to this court for review.

The first specification of error goes to the manner of the service of summons, and we consider it to be inconsequential. If any defects existed, they were waived and cured by Clark's answer and appearance in the court below. Paragraph 721 of the Revised Statutes provides: "The filing of an answer shall constitute an appearance of the defendant, so as to dispense with the necessity for the issuance or service of summons upon him."

The second claim of error is, that the paper purporting to be the answer of William Clark, filed June 23, 1896, is not tantamount to an entry of appearance by him; and this be-

cause it is not signed by him, and the court should take judicial notice that "Vanatta & Cunningham" are not licensed attorneys in this territory. The position is not tenable. Under our statutes a lawyer may be an attorney and officer of the district court and yet not be a member of the bar of the supreme court. We cannot take judicial knowledge of the officers of the district court of Yavapai County. The answer was signed, "Vanatta & Cunningham, Attorneys for Defendant, Wm. Clark." The judgment of the lower court recites "that the said defendant, William Clark, entered his appearance herein by filing his answer in the office of the clerk of this court, on the 23d day of June, 1896," etc. The presumption from the record is that these attorneys were duly qualified and authorized attorneys of said court.

Our holding as to the answer and appearance also disposes of the fifth specification of error. The remaining errors specified relate to alleged defects, variances, and informalities which do not, in our opinion, affect the jurisdiction of the court. The plaintiff in error, having answered in the court below, is bound by his pleading. No demurrer, general or special, was interposed by him; and not having directed them to the attention of the lower court, he cannot for the first time raise these questions here. The record disclosing no reversible error, the judgment is affirmed.

Street, C. J., Sloan, J., and Doan, J., concur.

[Civil No. 576. Filed April 16, 1898.]

[53 Pac. 192.]

ELIAS L. TIDWELL, Defendant and Appellant, v. THE
CHIRICAHUA CATTLE COMPANY, Plaintiff and
Appellee.

1. EJECTMENT—PUBLIC LANDS—OCCUPANT'S TITLE—EVIDENCE—DEEDS—ADMISSIBILITY—REV. STATS. ARIZ. 1887, PARS. 2222, 2223, 3135, 3138, CITED AND CONSTRUED—POSSESSORY ACTION—DEFENSES—TITLE IN UNITED STATES NO DEFENSE.—Deed from former owners and holders to plaintiff of the premises in controversy, the title

to which is in the United States, are admissible in evidence as tending to show plaintiff's right to possession in an action of ejectment against a trespasser or intruder, paragraph 2222, *supra*, providing that all persons who have settled upon and cultivated land with a view to pre-empting the same shall be protected in the possession of the same, with the improvements, to the extent of one hundred and sixty acres, and paragraph 2223, *supra*, providing that all rights acquired by the above section may be sold and conveyed as interests in real estate. In accordance with these provisions, our statutes do not necessitate the showing by the plaintiff of an absolutely clear and perfect title, but provide (par. 3135, *supra*) that "the action of ejectment may be maintained in all cases where the plaintiff is legally entitled to the possession of the premises." Paragraph 3138, *supra*, which provides that "the defendant may plead not guilty, and under such plea give in evidence any testimony tending to show that the plaintiff is not entitled to such possession, or that the title is in some person other than the government," *per contra*, excludes evidence of title in the government as a defense in ejectment.

2. PUBLIC LANDS—RIGHT OF CORPORATION TO HOLD—EJECTMENT—CANNOT BE QUESTIONED EXCEPT BY GOVERNMENT.—The question as to the power and authority of a corporation to take, own, or hold in possession unsurveyed public land of the United States cannot be raised by a defendant in ejectment, being only open to question in a direct proceeding instituted by the government for that purpose.
3. SAME—INITIATION OF RIGHT—QUALIFICATIONS—RIGHTS INITIATED PROPERLY—MAY BE TRANSFERRED TO ALIEN OR CORPORATION—POWERS OF GRANTORS—WHO MAY QUESTION.—While a qualified citizen can initiate a right to a tract of public land from which there can be perfected a title in fee, the rights thus initiated are property, susceptible of sale and transfer even to aliens, corporations, or other persons not capable of initiating such rights, and such grantees may own, possess, hold, enjoy, sell, transfer, and execute competent conveyances thereof, and the incapacity of such persons to originally initiate such right, or to subsequently perfect title, can be called in question only by the sovereign, and cannot be invoked by a stranger to attack their right of possession or the validity of their conveyances to subsequent grantees.
4. EJECTMENT—POSSESSION—EVIDENCE—SUFFICIENCY.—In an action of ejectment, it is not error for the trial court to hold that plaintiff was in possession when defendant's own testimony shows that there was a fence around the land; that most of it was in cultivation when he went there; that there was a house on the land, agricultural crops growing, and alfalfa in the stack; that he knew plaintiff claimed the property; that the occupants told him they were keeping it for plaintiff; that there was property there belonging to plaintiff; and that he moved into plaintiff's house.

5. SAME—SAME—SURREPTITIOUS ENTRY IN ABSENCE OF OWNER—EQUIVALENT TO FORCIBLE ENTRY IN PRESENCE.—A surreptitious entry during the temporary absence of the owner or tenant, against the will of said owner or tenant, and without his permission, is equivalent to a forcible entry against his will in his presence.
6. PUBLIC LANDS—RIGHT TO ENTER AND SETTLE UPON LANDS ALREADY OCCUPIED.—A person has no right to enter and make settlement upon public land settled upon and improved by others so long as such settlers or their grantees, by use, occupation, and cultivation, keep alive the rights they have initiated.
7. SAME—UNLAWFUL INCLOSURES—ACT OF CONGRESS OF FEBRUARY 25, 1885, CHAP. 149, SEC. 1, 23 STATS. 321, CONSTRUED—INAPPLICABLE TO TRACTS OF LESS THAN ONE HUNDRED ACRES OF LAND HELD IN GOOD FAITH UNDER CONVEYANCES OF RECORD—TRESPASS.—The statute, *supra*, has no application to the fencing of a tract of less than one hundred acres settled upon, cultivated, and irrigated, and held under conveyances of record, whether valid or invalid, under which the occupant claims in good faith. The defendant could not have made a lawful entry on the land of plaintiff so inclosed, but was a mere trespasser.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Graham. Owen T. Rouse, Judge. Affirmed.

The facts are stated in the opinion.

William H. Barnes, William Lovell, and Wiley E. Jones, for Appellant.

Appellant urges the following propositions: 1. Appellee was not in possession at the time of appellant's entry thereon; 2. Appellant's entry thereon was peaceable and without force; 3. Appellant had the right to enter peaceably and without force upon said lands and make settlement; 4. Appellee's inclosure was unlawful, and appellant had the right to enter through or over the fence of appellee and make settlement in good faith.

One occupying public lands without title cannot convey even the right to possession to another by deed. "It could not be effected by a written transfer." *Missionary Society v. Dalles City*, 107 U. S. 344, 2 Sup. Ct. 672.

A sale of a possessory or agricultural claim on public land is merely a contract for abandonment of possession by the vendor, and such abandonment will enable the vendee under

the statute to treat the claim as unoccupied public lands, and by his own compliance with the possessory act to appropriate the claim to himself.

Plaintiff in possession of public lands, not complying with the public act, could not maintain an action against one going upon lands so occupied by plaintiff and who held the same adversely. *Sweetland v. Froe*, 6 Cal. 140; *Wright v. Whitesides*, 15 Cal. 47; *Coryell v. Cain*, 16 Cal. 567.

In Oklahoma it has always been held that a "purchase of improvements of a settler upon public lands gave no settlement right on the purchaser, as such right is not transferable." *Sproat v. Durland*, 2 Okla. 24, 35 Pac. 682, 886.

California holds that a deed of a mere possessory right to land cannot be set up against an after-acquired title of the grantor. *Gee v. Moore*, 14 Cal. 472; *San Francisco v. Lawton*, 18 Cal. 465, 79 Am. Dec. 187; *Morrison v. Wilson*, 30 Cal. 344; *Hutton v. Frisbie*, 37 Cal. 475; *Emerson v. Sansome*, 41 Cal. 552; *Cadiz v. Majors*, 33 Cal. 288.

The question of prior right arising the plaintiff's right of possession may be inquired into and must be shown. *Sunal v. Hepburn*, 1 Cal. 255; *Meeker v. Williamson*, 4 Martin, 625.

There can be no possession unless the claimant has performed certain acts to constitute a location. It requires a location to give the right of possession, and a second person going upon a claim in the possession of another who has not perfected his location may make a valid location and thereby establish a "right of possession" as against the prior possessor, who is a transgressor from the time the second party has perfected his location in compliance with the law. A party must comply with the law to prevent a possession by another person. The "dog in the manger" policy is not tolerated as to our public domain by either state or federal laws. *Jordan v. Duke*, 4 Ariz. 278, 36 Pac. 896; *Belk v. Meagher*, 104 U. S. 384; *Horswell v. Ruiz*, 65 Cal. 111, 7 Pac. 197; *Morenhout v. Wilson*, 52 Cal. 263; *Barrett v. Sims*, 59 Cal. 613.

Location does not come from possession, but possession from location. *McCormick v. Barnes*, 1 Utah, 260; *Hopkins v. Noyes*, 4 Mont. 550, 2 Pac. 280; *Sweet v. Ronk*, 7 Colo. 443, 4 Pac. 752, 4 West Coast, 116.

"A party not having shown any capacity in himself to

acquire the government title to demand premises, nor any effort or intention to do so, stands in the position of a mere trespasser upon public domain, with an inclosure erected maintained contrary to the express provisions of the act of Congress of February 25, 1885, and the main question in the case is whether by such unauthorized inclosure he can prevent a homestead entry of the land by a citizen of the United States who goes peaceably upon a portion of the land and in other respects complies with the law. . . . We hold that the plaintiff (the later possessor) had the right to make his homestead entry of the whole tract, notwithstanding the possession by defendant of the greater part of it. . . . The evidence brought the plaintiff squarely within the provisions of the second section of the act of the legislature of this state (California) passed March 23, 1874, which reads as follows: 'Every qualified homestead claimant under the homestead laws of the United States, residing on public lands of the United States, within this state, who shall have made his original homestead entry in accordance with said laws, shall, from the date of said entry, be deemed to have title to and be in possession of all the land described in said entry, as against trespassers, and all persons having no superior right or title to the same, as long as he shall continue to reside thereon, and to comply in good faith with said homestead laws.' *Whittaker v. Pendola*, 78 Cal. 296, 20 Pac. 680. *Atherton v. Fowler*, 96 U. S. 513, which is so often cited by all persons seeking to claim or hold by prior possession, was a case where the first settler with a right to perfect title had his lawful possession invaded by a large number of persons, and was dispossessed in order to defeat his pre-emption right. This the court would not permit, but the court commenting upon one of its former decisions (*Johnson v. Towsley*, 13 Wall. 72), where it had sustained the party later in possession, said: 'The first party may not have the qualifications of a pre-emptor, or he may have pre-empted other land, or he may have permitted the time for filing his declaration to elapse, in which case another person may become pre-emptor, or it may not be known that the settlements are on the same quarter.' In *Atherton v. Fowler*, *supra*, the court had in view all along the case before it wherein the first possessor had a right to acquire title from the government, saying: 'It cannot be

believed therefore without the strongest evidence that Congress has extended a standing invitation to the daring and unscrupulous to dispossess by force the weak and timid from the actual improvement on public land, in order that the intentional trespasser may secure by these means the preferred right to buy land from the government when it comes into the market.' " . . .

Thus in all the cases in the United States supreme court each party dispossessed had a pre-emption right to acquire title, and was dispossessed by force, in order that the party ousting might obtain a right of possession. Such are not the facts in the case before this court, as the plaintiff has no right to acquire the title, was not dispossessed by force, and his possession was unlawful.

In *Johnson v. Towsley*, *supra*, the United States supreme court said that Congress intended to provide for the protection of the first settler by giving him three months to make his declaration, and for all other settlers by saying, "If this is not done within three months, any one else who has settled on it within that time, or at any time before the first settler makes his declaration, shall have the better right."

These decisions make the appellant secure in his possession.

It is a fundamental principle of law in ejectment that a plaintiff must recover, if at all, upon the strength of his own title, not upon the weakness of his opponent. *Rush v. French*, 1 Ariz. 99, 25 Pac. 816; *Cox v. Hayes*, 67 Cal. 317, 7 Pac. 722.

"There can be no color of title in an occupant of land, nor good faith affirmed of a party holding adversely, where he knows that he has no title, and that under the law, which he is presumed to know, he can acquire none by his occupancy." *Deffeback v. Hawke*, 115 U. S. 392, 6 Sup. Ct. 95; *Caldwell v. Bush*, 6 Wyo. 342, 45 Pac. 488.

A person who has a right of possession may by a peaceable entry upon land acquire sufficient possession of it to maintain an action against any one who, being in possession at the time of his entry therein, wrongfully continues upon the land. *State v. Ross*, 4 Jones' Law, 315, 69 Am. Dec. 754; *Low v. Elwell*, 121 Mass. 309, 23 Am. Rep. 272; *Caldwell v. Bush*, 6 Wyo. 342, 45 Pac. 488.

William Herring, and Moorman & McFarland, for Appellee.

The grantors of plaintiff were entitled to be protected in the peaceable and quiet enjoyment of the premises in question. Rev. Stats. Ariz., par. 2222.

All the rights acquired by plaintiff's grantors under the above section may be sold and conveyed as real estate. Rev. Stats. Ariz., par. 2223.

The action being ejectment, the court properly excluded testimony offered by defendant that the title to the premises in question was in the United States government. Rev. Stats. Ariz., par. 3138.

The mere fact that plaintiff corporation had not the capacity to take title to government land does not permit a collateral attack upon such title by an individual unless the same is directly authorized by legislative enactment.

In the case under consideration it is well settled that the only party who can assail the title of plaintiff is the United States government itself. *National Bank v. Matthews*, 98 U. S. 628; *Butte Hardware Co. v. Schwab*, 13 Mont. 351, 34 Pac. 24; *Connecticut Life Ins. Co. v. Smith*, 117 Mo. 261, 22 S. W. 628; *Brown v. Killabrew*, 21 Nev. 437, 33 Pac. 865; *Dodge v. Yates*, 76 Cal. 251, 18 Pac. 323; *Hambledon v. Dubain*, 71 Cal. 136, 11 Pac. 865; *Atherton v. Fowler*, 96 U. S. 513; *Bank v. Whitney*, 103 U. S. 99; *Fortier v. New Orleans Bank*, 112 U. S. 439, 5 Sup. Ct. 234.

"Where a corporation is incompetent by its charter to take title to real estate a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose." *Bank v. Matthews*, 98 U. S. 628; *Leazare v. Hillegas*, 7 Serg. & R. 313; *Groundie v. Water Co.*, 7 Pa. St. 323; *Runyon v. Coster*, 14 Pet. 122; *The Banks v. Poitoux*, 3 Rand. 136, 15 Am. Dec. 706; *McIndoe v. City of St. Louis*, 10 Mo. 577.

DOAN, J.—This is an action in ejectment that was brought by the appellee, as plaintiff, in the district court of Graham County, Arizona, for the possession of certain premises designated in the complaint as the "Cottonwood Ranch," a tract of unsurveyed public land, containing less than one hundred and sixty acres, and the improvements thereon. The complaint alleges appellee to be a corporation; "that it was en-

titled to the possession of said premises; that a large portion of the land is under fence, has been cultivated, and is capable of producing profitable crops from irrigation; that plaintiff has and owns certain ditches, water-rights, and water applicable thereto, enabling it to profitably cultivate said lands; that, while plaintiff was so entitled to such possession, defendant entered into and dispossessed plaintiff of said premises, and unlawfully withholds from plaintiff the possession thereof." Plaintiff, to sustain its contention, introduced certain articles of incorporation and certain deeds of record by which it deraigned title to the premises in question from its grantors and predecessors in interest. Defendant pleaded not guilty, and alleged "that the described land is a part of the unsurveyed public land of the United States, subject to settlement, and, when surveyed, subject to entry; that plaintiff is a corporation, and has no right, by its charter or by law, to possess and occupy any of the unsurveyed public lands, nor can said corporation acquire title thereto; and further alleges that defendant went upon said land when it was unoccupied and in the possession of no one; that defendant took possession thereof as a part of the unsurveyed public lands of the United States, for the purpose of acquiring title thereto, and with a view to entry as soon as the same should be surveyed." The district court found "that the plaintiff is entitled to the possession of the premises, to the sum of one hundred dollars damages for unlawful detention, and to ten dollars monthly rental from date of judgment until restitution."

Appellant in his brief presents ten assignments of error. The first four may be considered together, and allege that "the court erred in admitting as evidence the deeds of former owners and holders of said premises to plaintiff and its predecessors and grantors, upon the ground that such deeds conveyed no title, with the further objection that plaintiff, being a corporation, could not, under the law, own, control, or hold possession of unsurveyed public lands of the United States."

The first error assigned raises the point that the title is in the United States, and that, the title being in the United States, the deeds convey no title, and are inadmissible in evidence to show color of title or right of possession thereunder in ejectment against a trespasser or intruder. Besides being

contrary to the universal holding of our courts on this subject, this objection is fairly met by the provisions of our statutes. This is a suit for possession. Paragraph 2222, section 1, of the Revised Statutes of Arizona provides: "All persons who have settled upon and cultivated a tract of land in this territory, with the view of availing themselves of the benefit of the pre-emption laws of the United States, shall be protected in the peaceable and quiet enjoyment of said tract of land, with all the improvements thereon, to the extent of one hundred and sixty acres, if unsurveyed according to the cardinal points; and if surveyed, then according to the lines of said surveys." Paragraph 2223, section 2, provides: "All the rights acquired by the above section may be sold and conveyed as interests in real estate." In accordance with these provisions, our statutes in regard to ejectment do not necessitate the showing by the plaintiff of an absolutely clear and perfect title, but provide,—paragraph 3135: "The action of ejectment may be maintained in all cases where the plaintiff is legally entitled to the possession of the premises." Paragraph 3138: "The defendant may plead not guilty, and under such plea give in evidence any testimony tending to show that the plaintiff is not entitled to such possession, or that the title is in some other person other than the government." The provision for evidence of title in any other person other than the government, *per contra*, excludes evidence of title in the government, as a defense in ejectment; and as the statutes quoted provide that "all persons who settle upon and cultivate . . . shall be protected in the use and enjoyment of said land with all the improvements thereon," and that all the rights thus acquired "may be sold and conveyed as interests in real estate," the deeds showing such sale and conveyance are clearly admissible as evidence tending to show plaintiff's right to protection in such use, possession, and enjoyment of the land and improvements thus conveyed.

The further objection is urged that plaintiff, being a corporation, has no right under its charter or under the law to take, own, or hold in possession unsurveyed public land of the United States. This is not the case as to its authority under its charter to own and hold real estate. Its articles of incorporation, presented in evidence, show, among its purposes, "the owning and dealing in real estate." But if own-

ing and holding real estate were beyond or contrary to the provisions of its charter, the weight of authority is against allowing that question to be raised by the defendant in this issue. In *Bank v. Matthews*, 98 U. S. 628, the United States supreme court held: "Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose,"—and cites a strong line of authorities in support. It holds, further: "So an alien, forbidden by the local law to acquire real estate, may take and hold title until office found."

But stress is laid by the appellant upon the fact that this was public land, with the title yet remaining in the United States government, and that plaintiff, being a corporation, could not file on or perfect title thereto, that being a privilege reserved for qualified citizens only. The weight of authority has always been, and the settled policy of our courts may now, in the light of the more recent decisions on that point, be said to be, that while only a qualified citizen can, by location or filing, initiate a right to a tract of the public land, from which there can, by compliance with the requirements of the law and proper proof, be perfected a complete and valid title in fee,—the rights thus initiated by the qualified citizen become and are recognized as property susceptible of sale and transfer; and that such sale and transfer may be made to aliens, corporations, or other persons not possessing the qualifications that would enable them to initiate such rights and property interests. And when such sales and transfers are thus made, such grantees may own, possess, and hold, and enjoy the use and profits of such rights and property interests, and may sell and transfer the same to others, and execute competent conveyance thereof; and that the incapacity of such persons to originally initiate such right, or to subsequently perfect title, can be called in question only by the sovereign, and cannot be invoked by strangers to attack their right to be protected in the possession and enjoyment of such property, or the validity of their conveyance of the same to subsequent grantees. On this subject, the supreme court of the United States held as long ago as 1826, in an action of ejectment by *Gouverneur v. Robertson*, 11 Wheat.

332, 350, 352: "That an alien can take by deed, and can hold until office found, must now be regarded as a positive rule of law, so well established that the reason of the rule is little more than a subject for the antiquary." This ruling is approved and language quoted by the United States supreme court in *Manuel v. Wulff*, 152 U. S. 505, 14 Sup. Ct. 651. This was a case in which a citizen transferred by deed a mining claim to an alien, and the alienage of the grantee was pleaded by a contestant. Chief Justice Fuller quoted the above ruling, and, in accordance therewith, held that "as the grantor was a citizen, if his location were valid, his claim passed to his grantee, not by operation of law, but by virtue of his conveyance, and that the incapacity of the latter to take and hold by reason of alienage was, under the circumstances, open to question by the government only." In *Butte Hardware Co. v. Schwab*, 13 Mont. 351, 34 Pac. 24, it was contended that the plaintiff, as a corporation, was not competent to receive and hold an interest in an unpatented mining claim; and it appeared that the acquisition of such property was not specially within the scope of the object and purpose of the corporation, as expressed in its articles of incorporation. But the supreme court of Montana held that it could not be maintained even in such event that the title of the corporation as to such property was void, in favor of a stranger, who undertook unlawfully to assume and hold the property in question, and said: "No cases have been cited, and probably none can be found, where strangers have been heard to raise such a defense to their unwarranted claims upon the property of a corporation. To the contrary may be cited *First Nat. Bank v. Roberts*, 9 Mont. 323, 23 Pac. 718; *Bank v. Matthews*, 98 U. S. 621; *Bank v. Whitney*, 103 U. S. 99; *Fortier v. New Orleans Bank*, 112 U. S. 439, 5 Sup. Ct. 234."

The fifth, sixth, eighth, and ninth assignments are not sufficiently definite or specific to receive the attention of an appellate court.

The appellant urges four propositions of law under his seventh assignment of error, "that the judgment is contrary to law": (1) "Appellee was not in possession of the premises at the time of appellant's entry. (2) Appellant's entry thereon was peaceable and without force. (3) Appellant has the right to enter peaceably and without force upon said

lands, and make settlement. (4) Appellee's inclosure was unlawful, and appellant had the right to enter through or over the fence of appellee, and make settlement in good faith." We will consider these propositions *seriatim*.

In regard to the possession by appellee at time of entry by appellant, there was some conflict of evidence. The testimony of Blake (one witness) was direct and positive: "The company was in possession of the property at that time. Molino [the company's agent and tenant] was there at that time." The testimony of Snow (another witness) states: "After Tidwell had moved in, I and three other men, employees of the company, cleaned out the ditch, turned in the water, and irrigated the alfalfa. Tidwell was present. He was n't doing anything with the property as I remember, only living there." But the defendant's own testimony, while it is the only evidence that disputes or denies the possession of the plaintiff at time of entry, is sufficient to establish such possession beyond question. He stated: "There was no one in possession of the land when I went there. The property was just standing there when I went into it. There was a fence around about one hundred acres of it, and most all of that was in cultivation, and there was one house on the land when I went there. Molino and Snow told me they were keeping it for the Chiricahua Company. Molino left the property about the third day of February, 1896. I put my family there, and took possession of it, the second day after Molino left. There was some property belonging to the Chiricahua Company when I went there. There was agricultural crops there when I went there,—alfalfa. It was cut and stacked. At the time I went there, Molino has some property on that ranch. He had some hogs. He had some corn and some wire. I went into the Chiricahua house. I knew that the Chiricahua Company claimed the improvements there. I am living in my own house now. I built it the same month I moved in there. I use the company's house for a storeroom. I have not filed on the land in the land office because it has not yet come on the market." This evidence establishes the fact that at the time of change of tenants or employees, after the one man moved out, and before the arrival of his successor, the defendant moved in. In fact, he moved in before the first man had entirely moved out, for he testified that when he went there

Molino, the retiring tenant, had not yet removed his hogs, corn, or fencing-wire, but that Molino had that property yet remaining on the ranch. He seems to have adopted the theory that the physical presence of the owner or his representative was necessary to constitute possession. "Possession is the detention or enjoyment of a thing which a man holds or exercises by himself or by another, who keeps or exercises it, in his name." *Redfield v. Railroad Co.*, 25 Barb. 54. "Possession of land is the holding of, and exclusive exercise of dominion over it." *Booth v. Small*, 25 Iowa, 177. "There are two kinds of possession of real property known to the law,—actual and constructive. It is actual possession when the owner goes upon the land to take possession, and exercises acts of ownership over it; also when one having title is in possession of land by his tenant, agent, or steward." *Fleming v. Maddox*, 30 Iowa, 240. "By actual possession" is meant a subjection to the will and dominion of the claimant, and is usually evidenced by occupation, by a substantial inclosure, by cultivation, or by appropriate use." *Coryell v. Cain*, 16 Cal. 567. "Actual possession as much consists of a present power and right of dominion as an actual corporal presence." *Minturn v. Burr*, 16 Cal. 107-109.

The claim that the court erred in ruling that plaintiff was in possession is futile, and is fairly in line with the claim "that the defendant went upon the land when it was unoccupied, and in the possession of no one, and took and asserted possession over it, as a part of the unsurveyed public land," when his own testimony in support thereof states that there was a fence around about one hundred acres of it; that most all of that was in cultivation when he went there; that there was a house on the land, agricultural crops growing, and alfalfa in the stack; that he knew the appellee claimed the property; that the occupants, Molino and Snow, told him they were keeping it for the appellee; that Molino had some property yet on the ranch,—some hogs, corn, and wire; that there was property there belonging to the appellee; and that he moved into the appellee's house.

The second proposition—"Appellant's entry was peaceable and without force"—is not material, for the reason that in law a surreptitious entry during the temporary absence of the owner or tenant, against the will of said owner or tenant,

and without his permission, is equivalent to a forcible entry against his will, in his presence.

The third proposition—"Appellant had the right to enter peaceably and without force upon said lands, and make settlement"—is utterly and absolutely untenable. It would only be true if the lands in question were unoccupied public lands, and subject to settlement; but this doctrine became inapplicable to these lands, when Brown and Grieves settled upon and improved them, and thus withdrew them from entry and settlement by any subsequent entryman, and remained inapplicable so long as Brown and Grieves and their grantees and successors, by use, occupancy, and cultivation, kept alive the rights and improvements thus initiated, and will remain inapplicable so long as these rights are thus kept alive by these settlers, their grantees and successors, and such lands remain unsurveyed public lands. That this has been done in this instance was fully established by the evidence adduced in the district court. The deeds presented show that the appellee held by the conveyances from the original settlers and their grantees, and not by operation of law. The testimony of witnesses fully establishes the fact that the appellee and its grantors had held continuous possession of the land for several years, and from the date when their settlement and improvement had been originally made. The visible improvements—the dwelling-house, the inclosed fields, alfalfa growing, hay cut and stacked, hogs and corn on the ranch, an irrigating ditch that had been kept in constant repair, and had been used continuously for years on these premises, and through which the appellee turned in the water, and irrigated the alfalfa in the presence of appellant, even after the appellant had moved into the house on the ranch—place this property clearly within the scope of the decisions that stand in an unbroken line from *Coryell v. Cain*, 16 Cal. 567, and *Atherton v. Fowler*, 96 U. S. 513, to the present date, and which is aptly stated by Chief Justice Murphy, of the supreme court of Nevada, in *Brown v. Killabrew*, 21 Nev. 437, 33 Pac. 865: "It has been held by all courts since the decision in the case of *Atherton v. Fowler*, 96 U. S. 513, that a person cannot forcibly or surreptitiously enter upon the actual inclosure of another on the ground that the title is in the United States and thereby acquire a right of possession to the land within

the inclosure; and the fact that the defendant alleged that at some future time he intended to connect himself with the government title, by making application for the land as a homestead, did not give him any right as against the plaintiff."

This brings us to the fourth proposition—"Appellee's inclosure was unlawful, and appellant had the right to enter through or over the fence of appellee, and make settlement in good faith." The affirmance of the first proposition would not necessarily establish the second (*Gonder v. Miller*, 21 Nev. 180, 27 Pac. 333); but as there is no claim, and can be none, for the second, except upon the establishment of the first, we will direct our attention to that. This proposition is based upon an act of Congress of February 25, 1885, "To prevent the unlawful occupancy of public lands." The first section provides: "All inclosures of any public lands, . . . to any of which land included within the inclosure the person . . . or corporation making or controlling the inclosure had no claim or color of title, made or acquired in good faith, . . . at the time any such inclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, creation, construction, or control of any such inclosure is hereby forbidden." The second section empowers the court before which the suit is brought, in case the inclosure shall be found unlawful, to make the proper order or decree for the destruction of the inclosure in a summary way, unless the inclosure shall be removed within five days after the order of the court. The construction and scope of this act are discussed at considerable length in *United States v. Brandenstein*, 32 Fed. 738, and in *Cameron v. United States*, 148 U. S. 301, 13 Sup. Ct. 595. Both cases emphasize the restriction of this unusual and summary remedy to cases of wholly unauthorized appropriations and inclosures of public lands, to which the party making the inclosure "had no claim or color of title, made or acquired in good faith." In the latter case, the supreme court of the United States held that the provisions of the act of February 25, 1885, do not operate upon persons who have inclosed land under a *bona fide* claim or color of title, and said: "The act of Congress . . . was passed in view of a practice which had become common in the western territories of inclosing large areas of lands of the United States by

associations of cattle-raisers who were mere trespassers, without shadow of title to such lands, and surrounding them by barbed-wire fences, by which persons desiring to become settlers upon such lands were driven or frightened away, in some cases by threats or violence. The law was, however, never intended to operate upon persons who had taken possession under a *bona fide* claim or color of title. . . . It is a sufficient defense to such a proceeding to show that the . . . defendant had claim or color of title made or acquired in good faith." In *Wright v. Mattison*, 18 How. 50-56, it was said by Mr. Justice Daniel: "The courts have concurred, it is believed, without an exception, in defining 'color of title' to be that which in appearance is title, but which in reality is no title. . . . A claim to property, under conveyance, however inadequate to carry the true title to such property, and however incompetent might have been the power of the grantor in such conveyance to pass a title to the subject thereof, yet a claim asserted under the provisions of such a deed is strictly a claim under color of title." We do not wish to be understood as intimating an opinion as to the validity of defendant's title; but we think that defendant has shown color of title to the land inclosed. In the case at bar the inclosure was made by the original settler as an incident to his settlement and cultivation, and sold and conveyed by him to the grantor of appellee. The lands inclosed were not "tracts of vast area, or wild unimproved land of the public domain," as contemplated by the act of Congress, but a tract of less than one hundred and sixty acres, all in cultivation and actual use for agricultural purposes, and was held by the appellee, not "without claim or color of title," but by conveyances of record from grantors, under which appellee had for years held, occupied, plowed, seeded, irrigated, cultivated, and improved it. Such being the case, we hold, as did the supreme court of Washington in *Laurendeau v. Fugelli*, 1 Wash. 559, 21 Pac. 29, that "the appellant could not have made any lawful entry on the land. No law exists which gave him any right to such entry. He was a naked trespasser, making an unwarranted entry upon the inclosure of another,—an inclosure and occupation of years, upon which time, labor, and money had been expended. In such wrongful attempt to seize the fruits of the labors of another there could be no

bona fide claim of right whatever." We find no error in the record, and the judgment of the district court is therefore affirmed.

Street, C. J., Sloan, J., and Davis, J., concur.

[Civil No. 580. Filed April 16, 1898.]

[52 Pac. 1120.]

JOSEPH I. ROBERTS, Plaintiff and Plaintiff in Error, v.
C. W. SMITH, as Receiver of the Atlantic and Pacific
Railroad Company, Defendant and Defendant in Error.

1. APPEAL AND ERROR—TRANSCRIPT—MATERIAL EVIDENCE—TREATED AS ALL OF THE EVIDENCE—REVIEW OF INSTRUCTIONS—PRESUMPTION.—Where the transcript contains what purports to be all the material evidence in the case, this court will treat it as all of the evidence, as otherwise plaintiff in error could not be heard to complain about the instructions of the court to the jury, the presumption, where all the evidence is not before the court for review, being in favor of the regularity of the court in giving the instruction complained of.
2. RAILROADS—CARRIERS OF PASSENGERS—EJECTING PASSENGERS—FREIGHT-TRAINS—EVIDENCE—INSTRUCTIONS FOR DEFENDANT.—Where the evidence shows that plaintiff was at a small way-station on defendant's road; that at that time there was no station-agent there; that a train came along going west to Williams, to which point plaintiff wished to go, which was made up of freight-cars, two empty passenger-cars, and a car of the superintendent of the road; that the train, as the result of a signal, slowed up, and plaintiff boarded one of the passenger-cars while it was still in motion; that he tendered to the conductor his fare; that the conductor was making change when the superintendent told the conductor that plaintiff would have to get off; that the train was thereupon stopped within one and a half miles of the station and plaintiff was asked to get off, and his money was returned; that it was daytime, and plaintiff got off the train without force or violence and walked to and reached the station without any physical injury; that the train was a special freight-train and was not authorized to carry passengers; and that it was against the rules of the company to carry passengers on that train, an instruction to the jury to return a verdict for the defendant upon the motion of defendant is proper.
3. SAME—SAME—RIGHT TO DESIGNATE ON WHAT TRAINS PASSENGERS MAY RIDE.—Railroad companies have the right to designate on

what trains passengers may ride, and it is not the right of persons seeking passage over railroads to elect for themselves what trains they may ride on.

4. TRIAL—DEMURRER TO THE EVIDENCE—NATURE OF—IMPROPER PRACTICE—INVOLUNTARY NONSUIT—GRANTING IMPROPER—BRYAN v. PINNEY, 3 ARIZ. 34, CITED—INSTRUCTION TO THE JURY TO RETURN VERDICT FOR DEFENDANT—PROPER PRACTICE.—A demurrer to the evidence takes from the jury all consideration of the case, and the judgment is rendered by the court alone, and it operates in the same way as a motion for a nonsuit. It has been decided by this court in *Bryan v. Pinney*, *supra*, that an involuntary nonsuit cannot be allowed under the statutes of Arizona. The proper practice under the Arizona statute is by an instruction to the jury.
5. SAME—JURY—INSTRUCTION TO RETURN VERDICT FOR DEFENDANT—WHEN GRANTED.—The court may instruct the jury to return a verdict for the defendant when it appears that upon the case made by plaintiff's evidence, all taken as true, the defendant is not liable; that, taking the evidence in its strongest light against the defendant, the plaintiff has presented no case upon which he is entitled to recover.

WRIT OF ERROR from a judgment of the District Court of the Fourth Judicial District in and for the County of Coconino. Owen T. Rouse, Judge. Affirmed.

The facts are stated in the opinion.

Morrison & Morrison, and E. M. Sanford, for Plaintiff in Error.

The existence of the relation of passenger and carrier is only to be implied from such circumstances as will warrant an implication that the one has offered himself to be carried and the other has accepted the offer. *Webster v. Fitchburg R. R. Co.*, 58 Am. & Eng. R. R. Cases, 1; *Webster v. Fitchburg*, 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521; *Dodge v. Boston etc. S. S. Co.*, 148 Mass. 207, 19 N. E. 373, 2 L. R. A. 83.

Where one, although he has paid no fare, is on a car with the knowledge and permission of the person in charge thereof, he is a passenger, and is entitled to the same care and protection as if he had paid fare. *Merchhausen v. St. Louis R. R. Co.*, 28 Am. & Eng. R. R. Cases, 157; *State v. Hurlstone*, 92 Mo. 332, 5 S. W. 38; *Sherman v. Hannibal*, 72 Mo. 65, 37 Am. Rep. 423.

Every one riding in a railroad car is presumed to be there
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lawfully as a passenger, having paid, or being liable to pay when called upon to pay his fare. *Gillingham v. Ohio River R. R. Co.*, 51 Am. & Eng. R. R. Cases, 222; *Gillingham v. Ohio River R. R. Co.*, 35 W. Va. 588, 29 Am. St. Rep. 827, 14 S. E. 243, 14 L. R. A. 798; *Young v. Commissioners of Mahoning County*, 53 Fed. 897.

A passenger having a ticket for a passage upon a railroad who boards a freight-train which does not carry passengers, believing the ticket good on that train, is to be treated as a passenger, and not as a trespasser. *Bogges v. Chesapeake etc. R. R. Co.*, 37 W. Va. 297, 16 S. E. 525, 23 L. R. A. 777.

When it is customary for persons to enter cars without a ticket and to pay on the train, if a passenger enters and takes a seat, and the conductor makes an assault on him, the company is liable. *Illinois Central R. R. Co. v. Sheehan*, 29 Ill. App. 90.

If a carrier knowing there is good ground for refusing to carry a passenger, nevertheless receives him, he cannot afterward eject him for the same cause. *Person v. Duane*, 4 Wall. 605; *Tarbell v. Railroad Co.*, 35 Cal. 616.

Extra train not carrying passengers. Even though forbidden by the rules, if the person acted in good faith, he will be entitled to all the rights of a passenger. *Everett v. Oregon etc. R. R. Co.*, 9 Utah, 340, 34 Pac. 289.

A passenger is not supposed to know of a rule. He may know that passengers are carried and not know under what circumstances or conditions, and until so informed is not a trespasser. *Pulcher v. Railroad Co.*, 38 Kan. 516, 5 Am. St. Rep. 770, 16 Pac. 945; *Lucas v. Railroad Co.*, 33 Wis. 64; *Durer v. Railroad Co.*, 58 Me. 188; *Arnold v. Railroad Co.*, 115 Pa. St. 135, 2 Am. St. Rep. 542, 8 Atl. 213; see, also, note in 8 Atl. 216.

Stopping a train at a station is an invitation to the public to take passage. *Railroad Co. v. Werle*, 21 Am. & Eng. R. R. Cases, 429; *Werle v. Long Island R. R. Co.*, 98 N. Y. 650.

Conceding that defendant had a right to eject him from the train, it had no right to do it elsewhere than at a station. *Maples v. Railroad Co.*, 33 Conn. 561; *Hardenberg v. Railroad Co.*, 39 Minn. 3, 12 Am. St. Rep. 610, 38 N. W. 625.

When the passenger entered the train in good faith the company could not eject him elsewhere than at the station.

Galena v. Hot Springs R. R. Co., 13 Fed. 119; *Pearson v. Duene*, 4 Wall. 695.

If a passenger takes a wrong train, he is a passenger on that train. *Railroad Co. v. Powell*, 4 Ind. 37.

If a passenger takes a wrong train through the fault of the servants of the railroad company, the relation of passenger and carrier exists between him and the company. *Railroad Co. v. Gilbert*, 64 Tex. 539; *Railroad Co. v. Smith*, 1 S. W. 565.

Where a person is invited to enter a car the relation of carrier and passenger is created. *Railroad Co. v. Martin*, 11 Ill. App. 386.

If a passenger is permitted to take a train at a place which is not a station, he is not a trespasser. *Dewire v. Boston etc. R. R. Co.*, 148 Mass. 343, 19 N. E. 523, 2 L. R. A. 166.

It was the duty of the conductor to notify the plaintiff before the train started. *Burke v. Railroad Co.*, 51 Mo. App. 491; *Hobbs v. Railroad Co.*, 49 Ark. 357, 5 S. W. 586.

The whole power and authority of a corporation *pro hac vice* is vested in conductors (as to their relation to passengers). *Randolph v. Railroad Co.*, 18 Mo. App. 609; *Bass v. Railroad Co.*, 36 Wis. 450, 17 Am. Rep. 495.

Where there is no ticket-agent, and he "applies for passage or enters their passenger-trains without having such ticket, but offers to pay the usual fare, the company cannot lawfully eject or reject him." *People v. Railroad Co.*, 16 Or. 26, 8 Am. Rep. 289, 19 Pac. 107; *Phettipone v. Railroad Co.*, 84 Wis. 412, 54 N. W. 1092.

If the conveyance is one which by contract the passenger has no right to take, the company's duty is to inform him and put him off at a proper place. *Railroad Co. v. Rosensweig*, 26 Am. & Eng. R. R. Cases, 498; *Railroad Co. v. Schwindling*, 101 Pa. St. 258, 47 Am. Rep. 706.

The illegal ejection of a passenger entitled by contract to be carried over a railway is itself an act for which damages are recoverable. The measure is for the jury. *Railroad Co. v. Homer*, 27 Am. & Eng. R. R. Cases, 186.

Plaintiff is entitled to recover damages, and also smart money, because the general superintendent participated in the wanton and oppressive acts. *Railroad Co. v. Prentice*, 15 Sup. Ct. 265; *Denver etc. R. R. Co. v. Harris*, 122 U. S. 597, 30 L. Ed. 1146, 7 Sup. Ct. 1286.

C. N. Sterry, for Defendant in Error.

The plaintiff affirmatively proved by his own evidence that the train which he got upon was not a train which under the rules and regulations of the railroad company carried passengers. Therefore, the plaintiff had no right to go upon such train for the purpose of being carried, and the railroad company had a perfect right to put him off the train after he had gotten upon it.

It is a rule that a person about to become a passenger to be transported by a railroad company upon its line of road must at his own peril ascertain the rules and regulations of the company concerning the trains on which he may ride from the point he desires to take passage to the station at which he wishes to leave the train. *Chicago etc. R. R. Co. v. Randolph*, 53 Ill. 510; *Illinois Cent. R. R. Co. v. Nelson*, 59 Ill. 110; *Hobbs v. Railroad Co.*, 49 Ark. 357, 5 S. W. 586, 34 Am. & Eng. R. R. Cases, 268; *Duling v. Railroad Co.*, 66 Md. 120, 6 Atl. 593; *Railroad Co. v. Bartram*, 11 Ohio St. 463; *Chicago etc. R. R. Co. v. Bills*, 104 Ind. 13, 3 N. E. 611; *Lake Erie etc. R. R. Co. v. Lucas*, 18 Ind. App. 239, 47 N. E. 842; *McRae v. Railroad Co.*, 88 N. C. 526, 43 Am. Rep. 745; *Railroad Co. v. Cameron*, 66 Fed. 709; *Texas etc. R. R. Co. v. Ludlam*, 57 Fed. 481, 6 U. S. C. C. App. 455; *Plott v. Railroad Co.*, 63 Wis. 511, 23 N. W. 415; *Deitrich v. Railroad Co.*, 71 Pa. St. 432; *Atchison-Topeka Railroad Co. v. Gants*, 38 Kan. 608, 17 Pac. 54.

At common law, and in the absence of statute, one wrongfully on a train may be expelled at any point not dangerous, and the conductor is not required to wait until a station is reached. *Louisville etc. R. R. Co. v. Johnson*, 92 Ala. 204, 25 Am. St. Rep. 35, 9 South. 269; *Everett v. Railroad Co.*, 69 Iowa, 15, 58 Am. Rep. 207, 28 N. W. 410; *Brown v. Railroad Co.*, 51 Iowa, 235, 1 N. W. 487; *Railroad Co. v. Hinsdale*, 38 Kan. 507, 16 Pac. 937; *McClure v. Railroad Co.*, 34 Md. 532, 6 Am. Rep. 345; *Railroad Co. v. Miller*, 19 Mich. 305; *Wyman v. Railroad Co.*, 34 Minn. 210, 25 N. W. 349; *Railroad Co. v. Skillman*, 39 Ohio St. 444; *Moore v. Railroad Co.*, 38 S. C. 1, 16 S. E. 781.

STREET, C. J.—Plaintiff in error instituted an action in the district court of Coconino County against the defendant

in error to recover damages for ejecting him from a train on the fourteenth day of July, 1894, which train was operated by the general superintendent and the employees of the Atlantic and Pacific Railroad, alleging that he boarded the train at the town of Challender, on the line of said railroad in Coconino County, as a passenger, with the intention of riding to the town of Williams on said line of railroad. The case was tried before a jury, and after the plaintiff had introduced all his evidence the court, on motion of the defendant, instructed the jury to bring in a verdict for the defendant, which was accordingly done, and judgment was rendered thereon in favor of the defendant; that plaintiff take nothing by his complaint; that defendant go hence without day, and recover from plaintiff his costs. From which judgment and ruling of the court on the trial of this cause plaintiff takes his writ of error.

The transcript contains what purports to be all the material evidence in the case, and we shall treat it as all of the evidence; otherwise, plaintiff in error could not be heard to complain about the instructions of the court to the jury. If all the evidence be not before the court for review, the presumption would be in favor of the regularity of the court in giving the instructions to the jury to bring in a verdict for the defendant. The evidence shows, however, that on the fourteenth day of July, 1894, plaintiff was at Challender, in Coconino County, Arizona, for the purpose of buying stock to be used in his butcher business; that he lived at Prescott, Arizona, and was desirous of going from Challender to Williams, Arizona, a station just west of Challender; that Challender is a small way-station on the line of the road; that the plaintiff was there on or about the 14th of July, and at that time there was no station-agent at Challender; that on the afternoon of that day a train came along going west through Challender to Williams, which was made up of freight-cars, two empty passenger-cars, and the car of the superintendent of the road; that the train, as the result of a signal, slowed up in approaching the station, but did not stop, and as the train slowed up the plaintiff boarded one of the passenger-cars while it was in motion; that he there saw a man on the platform of the car that he boarded whom he took to be a conductor; that the man was not in uniform, but he handed

the man after he had got onto the platform of the car a five-dollar bill; that the man to whom he handed the money was feeling round in his pocket for change when the superintendent of the road called to the man, and told him that plaintiff would have to get off. Thereupon the train was stopped, and plaintiff was asked to get off the train, which he did without force or violence, and without being in any way physically injured. His money was given back to him. This was about a mile or a mile and a half west of Challender, and the plaintiff walked back to Challender. This all happened in the daytime, and plaintiff reached Challender without any physical injury.

Plaintiff further showed from the testimony of the superintendent, who was on the train at that time, that the train was made up of several cars of coal, two deadhead coaches, and the officers' car, in which he was riding; that the train was a special freight-train, and no person had authority to permit passengers to be carried on that train on that day without the permission of himself or the superintendent of transportation; that the train was not authorized by any one to carry passengers; that the train was slowed up in acknowledgment of signals to stop as the train approached Challender; that he saw the plaintiff get on the train, and immediately sent word to the conductor that this was not a passenger-train, that he could not carry passengers, and that the plaintiff be put off; that if any passengers were on the train they were there without his knowledge or permission; that it was against the rules of the company to carry passengers on that train; and that he would not have allowed the train to stop at Challender either to take on or let off passengers on that day. When plaintiff had introduced the foregoing evidence he closed his case, whereupon the defendant moved the court to instruct the jury for a verdict for the defendant, which was given as before stated.

We have examined many authorities cited in the brief of plaintiff in error, and find them to bear more particularly upon the question of relation between the passenger and carrier after ticket purchased or contract made. We have also examined many cases cited by defendant in error as to the right of a railroad company to designate upon what trains passengers may ride, and as to the right of a railroad com-

pany to prohibit passengers from getting on and riding on certain trains. We regard the rule as well established that railroad companies have a right to designate on what trains passengers may ride, and that it is not the right of persons seeking passage over railroads to elect for themselves what trains they may ride on. The authorities cited in the brief of defendant in error are full and complete upon that question, and, without quoting from them at length, we will quote from the case of *Railroad Co. v. Randolph*, reported in 53 Ill. 510, 5 Am. Rep. 60, which is as follows, to wit: "No one will question the legal right of a railroad company to appropriate a portion of their trains exclusively to the carrying of freight, and to entirely exclude passengers from such trains. Their obligations to the public only require them to furnish sufficient passenger-trains to accommodate the travel and such freight-trains as the business of the country along their lines requires. . . . They are not required to carry passengers on their freight-trains, or freight on their passenger-trains, but they may, if they choose, do either." And also from the case of *Railroad Co. v. Nelson*, reported in 59 Ill. 110: "Railroads are created for the transportation of both persons and property, and, from the time when first introduced into use, such have provided different modes of carrying each. They have furnished coaches constructed exclusively for the conveyance of passengers, and cars for the conveyance of freight. Their construction is entirely different, and there is a great difference in the two kinds of trains, and each is only adapted to the purpose of its construction. . . . The law has not required such corporations to carry passengers on their freight-trains, nor freight in their passenger-coaches. It only requires them to carry both, leaving it to them to regulate the manner in which it shall be done, and custom has sanctioned the mode adopted. It has never, so far as we are aware, been held that railroads are required to provide the means for carrying passengers on their freight-trains. That is left to their discretion, and it is a matter of choice with them whether or not they shall, for the accommodation of the public, adopt such mode of transporting passengers; and being a matter of choice, and not a duty, they may, in adopting such a mode, impose all reasonable rules consistent with the safety of passengers and the management of their business." Similar expressions

may be found in numerous reports, which makes the law of the case well settled. In this particular instance the defendant had not bought a ticket. No agent of the railroad company had sold him any ticket by which he was authorized to board any train, nor had any agent of the company represented to him that the train which he boarded was one upon which he might ride. His own evidence showed that the train was stopped out of its regular order by a signal which must have been given by some one not connected with the railroad company, for no agent or any one connected with the company was shown to be upon the ground to give the signal; that he took advantage of the signal that was given, and boarded the train while it was in motion, and that after he boarded the train he attempted to pay for his passage, the pay was declined, and the train was stopped, and plaintiff was ejected within a very few minutes after he had boarded the train. Under these circumstances, what contract between himself and the company had been violated? If none, he could recover no damages for the violation of a contract. His own evidence showed that he was ejected from the train in the most orderly way, and received no physical injuries therefrom. No doubt plaintiff was misled as to its being a train calculated to carry passengers from the fact that there were two deadhead passenger-coaches going through, and also an officers' car, which he says he did not recognize as such until after he was ejected. Plaintiff made a mistake without the fault of the company, and his mistake was corrected without the loss of property or physical injury to plaintiff. It clearly was the right, under such showing, for the court to instruct the jury as it did.

The defendant in error first demurred to the evidence, which demurrer was allowed by the court, but no judgment was rendered thereon. Afterwards defendant asked the court to instruct the jury to bring a verdict for it, which was given, and verdict so rendered. It has been decided by this court in the case of *Bryan v. Pinney*, reported in 3 Ariz. 34, 21 Pac. 332, that an involuntary nonsuit cannot be allowed under the statutes of Arizona. The same rule prevails in the federal circuit and district courts, and a demurrer to the evidence would operate in the same way as a motion for a nonsuit. It takes from the jury all consideration of the case, and the judg-

ment is rendered by the court alone. The old English *nisi prius* practice was, that "the plaintiff is in no case compellable to be nonsuited, and if he insists upon the matter being left to the jury, they must give in their verdict." 2 Tidd's Practice, 869. The proper practice under the Arizona statute is by an instruction to the jury. When it appears to the trial court that upon a case made by plaintiff's evidence, all taken as true, the defendant is not liable; that, taking the evidence in its strongest light against the defendant, the plaintiff has presented no case upon which he is entitled to recover,—the court may instruct the jury to return a verdict for the defendant. We think this case falls clearly within the rule, and the court committed no error in giving such instruction. The judgment of the district court is affirmed.

Sloan, J., Doan, J., and Davis, J., concur.

[Civil No. 603. Filed April 16, 1898.]

[52 Pac. 1125.]

H. H. PILLING et al., Defendants and Appellants, v.
THE ST. LOUIS REFRIGERATOR AND WOODEN-
GUTTER COMPANY, a corporation, Plaintiff and
Appellee.

1. OPEN ACCOUNTS—PLEADING—ANSWER—VERIFICATION—GUARANTORS—REV. STATS. ARIZ. 1887, PAR. 1880, INAPPLICABLE.—Paragraph 1880, *supra*, providing that when any action or defense is founded upon an open account, supported by the affidavit of the party, the same shall be taken as *prima facie* evidence thereof, unless the defendant shall file a written denial under oath, and where the defendant fails to file such affidavit he shall not be permitted to deny the account, is not applicable as against guarantors upon an open account.
2. PLEADING—ANSWER—VERIFICATION—DENIAL OF CONTRACT NOT ALLEGED TO BE IN WRITING—REV. STATS. ARIZ. 1887, PAR. 735, CONSTRUED.—Paragraph 735, *supra*, providing that any answer setting up a denial of the execution of any instrument in writing upon which any pleading is founded in whole or in part, and charged to have been executed by him or his authority, shall be verified by affidavit, does not require the verification of an answer to a com-

plaint which fails to set up a written contract either *in extenso* or in substance with the allegation of its execution, though the contract alleged by its nature would have to be in writing.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. J. D. Bethune, Judge. Reversed.

The facts are stated in the opinion.

Charles Blenman, for Appellants.

Barnes & Martin, for Appellee.

STREET, C. J.—The St. Louis Refrigerator and Wooden-Gutter Company, a corporation, the appellee herein, brought an action in the district court of Pima County against the appellants herein to recover a balance due upon an account in the sum of \$332.53, which the firm of Holmes & Drachman were owing them. Plaintiff alleged in its complaint that the defendants had entered into a contract with plaintiff to be responsible for and guaranty the payment of the account. The complaint itself was not verified, but the account attached to the complaint was sworn to by plaintiff under paragraph 1880 of the Revised Statutes of Arizona. The defendants answered the complaint, denying all of the allegations of the complaint, and denying any contract with the plaintiff to become responsible for the account or surety for Holmes & Drachman.

Paragraph 1880 of the Revised Statutes of Arizona reads as follows: "When any action or defense is founded upon an open account supported by the affidavit of the party, his agent or attorney, taken before some officer authorized to administer oaths, to the effect that such account is, within the knowledge of the affiant, just and true, that it is due, and that all just and lawful offsets, payments, and credits have been allowed, the same shall be taken as *prima facie* evidence thereof, unless the defendant shall, at least one day before the trial, file a written denial under oath, stating that such account is not just or true in whole or in part, and if in part only, stating the items and particulars which are unjust. Where he fails to file such affidavit he shall not be permitted to deny the account or any item therein, as the case may be."

Judgment was rendered for the plaintiff on the pleadings, and the only question for this court to determine is whether the court committed error in rendering judgment against these defendants under that statute. The statute is intended to regulate the introduction of evidence on open accounts between debtor and creditor, and had Holmes & Drachman, who were the primal debtors, been the defendants to the action in the place of these defendants, the statute would have applied. But the plaintiff alleged a contract between itself and the defendants, wherein the defendants were to become responsible for any account of Holmes & Drachman, and it became necessary for plaintiff to prove that contract, which it did not do, but relied upon paragraph 735 of the Revised Statutes of Arizona, which provides that any answer setting up a denial of the execution of any instrument in writing upon which any pleading is founded, in whole or in part, and charged to have been executed by him or his authority, shall be verified by affidavit; and plaintiff argues that since its complaint alleges a contract which by its nature would have to be in writing, the defendants would have to deny the execution of such contract. That is going far beyond the contemplation of the statute. While it is well settled that in an action upon a promise to answer for the debt or default of another it is not necessary for the complaint to aver that the promise was in writing, yet before the defendant can be called upon to verify an answer denying the execution of any instrument, the instrument must be declared upon. If plaintiff in its complaint had set up a written contract either *in extenso* or in substance with the allegation of its execution, the defendants would have been required to have denied the execution under a sworn answer, or else have suffered the execution of the instrument to stand as confessed. But in this case there was no verification of the complaint; there was no setting out of the written instrument upon which it sought to hold the defendants, but it only set out an open account, and contented itself with having an affidavit to that account alone. To have called upon these defendants to have denied specifically under oath the account which existed between the plaintiff and some one else would have been requiring the defendants to swear to matters outside of their own personal knowledge, before being permitted to make any defense to it.

The case of *McCamant v. Batsell*, 59 Tex. 363-371, cited by the appellants in their brief, is quite conclusive of the question. The case discusses the applicability of article 2266 of the Revised Statutes of Texas, 1879, of which paragraph 1880 of the Revised Statutes of Arizona is a copy, to the situation of parties standing in the same relation to each other as the plaintiff and defendants in this case stand towards each other and towards the primal debtors. The judgment of the district court is reversed and the case remanded for a new trial.

Sloan, J., Davis, J., and Doan, J., concur.

[Civil No. 575. Filed April 16, 1898.]

[53 Pac. 205.]

**JAMES REILLY, Plaintiff and Plaintiff in Error, v.
COUNTY OF COCHISE, Defendant and Defendant in
Error.**

1. **OFFICE AND OFFICERS—SUPERVISORS—ACTION FOR COMPENSATION—COMPLAINT—INSUFFICIENCY—LAWS 1889, ACT NO. 15, SEC. 1, CONSTRUED.**—In an action for compensation for services rendered as a member of the board of supervisors, a complaint which alleges that "plaintiff rendered services in his attending and acting at regular, adjourned, and lawfully called special sessions of said board" is subject to a general demurrer, it not being alleged therein that any county business was transacted upon the days for which compensation is sought, and the statute, *supra*, providing for compensation "five dollars per day for each day's actual attendance at the sitting of said board at which sitting any county business is transacted."
2. **SAME—SAME—SAME—COMPLAINT ALLEGING USURPATION OF OFFICE—FAILURE TO ALLEGE TRANSACTION OF BUSINESS BY DE JURE BOARD—PRESUMPTIONS.**—When the complaint for compensation for services as a member of the board of supervisors shows that during the time the services were alleged to have been rendered he and the other members of the lawful board were excluded from office by certain usurpers, and fails to allege that the business of the county was transacted by the *de jure* board, it will be presumed to have been transacted by the *de facto* board.
3. **SAME—SAME—VOLUNTARY PAYMENTS FOR BENEFIT OF COUNTY—NOT RECOVERABLE.**—No recovery can be had on account of a voluntary

payment made by a member of the board of supervisors on account of costs and expenses in a suit by the county where there is no showing that plaintiff was authorized to make the payments and expenditures, nor that they were subsequently ratified.

4. SAME—SAME—VOLUNTARY EXPENDITURE IN ATTENDANCE UPON SUIT BY COUNTY—NOT RECOVERABLE.—Voluntary expenditures for travel, board, and lodging while attending a hearing on a suit by the county, made by a member of the board of supervisors, are not recoverable, no showing being made that plaintiff was authorized or requested by the county to be present.

ERROR to the District Court of the Second Judicial District in and for the County of Cochise. J. J. Hawkins, Judge. Affirmed.

The facts are stated in the opinion.

James Reilly, *in pro. per.*

The compensation of an office belongs to the officer *de jure*, and this even after the salary has been paid to the officer *de facto* (which was not done in this case). *People v. Potter*, 63 Cal. 127; *Ward v. Marshall*, 96 Cal. 155, 31 Am. St. Rep. 198, 30 Pac. 1113; *Memphis v. Woodward*, 12 Heisk. (Tenn.) 499, 27 Am. Rep. 750; *State v. Carr*, 129 Ind. 44, 28 Am. St. Rep. 163, 13 L. R. A. 177, 28 N. E. 88; *Andrews v. Portland*, 79 M. E. 484, 10 Am. St. Rep. 280, 10 Atl. 458; *Williams v. Clayton*, 6 Utah, 86, 21 Pac. 398.

Allen R. English, District Attorney, for Defendant in Error.

SLOAN, J.—Plaintiff in error, James Reilly, brought suit in the court below upon his complaint, wherein he sought to recover upon two causes of action. The first charged that the county was indebted to him in the sum of one hundred and sixty dollars for services rendered as a member of the board of supervisors of said county between the eighth day of September, 1893, and the thirty-first day of December, 1894. The facts alleged in support of the first cause of action are as follows: That on the — day of June, 1893, a vacancy occurred in the office of supervisors of said county by reason of the resignation of Scott White, as a member of said board; that on said day, by petition of forty qualified electors, the

remaining members of the board, with the probate judge of said county, duly elected the plaintiff member of said board to fill said vacancy, and that thereupon plaintiff duly qualified as such supervisor as required by law, and thereupon entered upon the discharge of the duties of said office, and acted and served as such from the said — day of June, 1893, to the thirty-first day of December, 1894; that between the eighth day of September, 1893, and the thirty-first day of December, 1894, "plaintiff rendered services as such supervisor to said county in attending and acting at regular, adjourned, and lawfully called special sessions of said board thirty-two days"; that on the ninth day of September, 1893, "certain persons, claiming to be supervisors and clerk of the board of supervisors of said county, forcibly took possession of the office of said board, and of the seal and records thereof, and forcibly excluded from said office, and from the records of said board, the lawful board of supervisors, of which plaintiff was a member, and the lawful clerk of said board, until the expiration of the term of office of said board, on December 31, 1894." The plaintiff further alleges that after the ninth day of September, 1893, and prior to the thirty-first day of December, 1894, several actions were brought to try the title to the offices of board of supervisors of said county, and that of the clerk of said board, which actions were not finally determined until February, 1895; that an action was also brought by the lawful board against the usurping board and its clerk to enjoin the latter from issuing and paying any warrants for their own *per diem* compensation and salaries; that thereafter, and in February, 1895, a final judgment was rendered in the latter action, adjudging the defendants to be usurpers in office, and perpetually enjoining the payment to them of any *per diem* compensation or salaries, and that no *per diem* compensation or salaries have, in fact, ever been paid to said usurpers; that, because of the pendency of said suits to try the title to said offices, plaintiff made no effort to recover any compensation for his services until after the final determination of said suits, in February, 1895; that on the — day of April, 1895, plaintiff presented to the probate judge of said county "his claim for *per diem* for thirty-two days' services duly itemized and verified and certified by the lawful clerk of the board of which plaintiff was a member, for allowance; and on the

— day of April, 1895, the said probate judge and the said board of supervisors wholly disallowed said claim, and no part thereof has been paid."

The second cause of action sued upon reads as follows: "That on the 26th day of March, 1894, the lawful board of supervisors of said county of Cochise, of which plaintiff was a member, duly made a resolution appointing Allen R. English counsel for said county to bring an injunction suit against W. K. Perkins, E. A. Nichols, and C. S. Clark, usurping supervisors of said county, and Nat Hawk, usurping clerk of the board of supervisors of said county, and others, to enjoin them from issuing county warrants in payment of their own *per diem* and salaries, which action was brought, the injunction issued, and sustained, and made final by judgment of this court; that at the time the resolution aforesaid was made and the injunction suit was brought, and during its pendency, the district attorney of said county and the clerk of this court were both partisans of and in collusion with the aforesaid usurping board and its clerk, and the said district attorney had refused to bring said injunction suit, though requested to do so by resolution of said lawful board, and refused to, in any way, further said suit, and the said clerk refused to do any duty as said clerk in said injunction suit unless his fees therefor were paid in advance; that, by reason of the recitals aforesaid, plaintiff necessarily paid to said clerk, as fees of said injunction suit, between the 30th day of March, 1894, and the 14th day of May, 1895, the sum of fourteen dollars, and during the same time necessarily traveled twice to Tucson to oppose motions to dissolve said injunctions, and to give testimony therein, and, in rendering said services, paid out of his own money for carriage and railroad fare, and for board and lodging, the sum of \$46.80, of all which sums the said county had the benefit, and no part thereof has been paid; that on the 3d day of July, 1895, plaintiff presented to the board of supervisors of said county, and filed with its clerk, his claim, duly itemized and verified and certified to, as required by law, for said sums amounting to \$60.80; and thereafter, on the 12th day of July, 1895, the said board wholly disallowed and rejected said claim." To this complaint defendant demurred on the ground that it failed to state a cause of action. This demurrer was sustained by the trial

court, and the correctness of this ruling presents the only question for our consideration.

The demurrer was properly sustained to the first cause of action, for the reason that it is not alleged therein that any county business was transacted upon the days for which compensation is sought. Section 1, Act No. 15, Laws 1889, provides: "Each member of the board of supervisors within this territory shall be allowed as compensation for their services five dollars per day for each day's actual attendance at the sitting of said board at which sitting any county business is transacted." It will be seen from this section that compensation is only allowed a supervisor when he attends a sitting of the board at which county business is actually transacted. The allegation in the complaint is, that "plaintiff rendered services in his attending and acting at regular, adjourned, and lawfully called special sessions of said board." Plaintiff also charges that during the time the alleged services were rendered he and the other lawful members of the said board were excluded from office by certain usurpers. If the latter were *de facto* officers, and in possession of the offices, it is fair to presume that the county business was actually transacted by the *de facto* board, and not by the *de jure* board, of which plaintiff was a member. If this were not so, plaintiff should have made the fact to appear by proper averment in his complaint.

The demurrer was also properly sustained to the second cause of action for the reasons: 1. The payment to the clerk does not appear to have been authorized by the board of supervisors or subsequently ratified as a payment for and in behalf of the county, and was therefore a voluntary payment, for which no recovery could be had; and 2. The expenditures for travel, board, and lodging while attending upon the hearing of motions to dissolve temporary injunctions appear, likewise, to have been voluntary. There is no showing that plaintiff was authorized to represent the county as an attorney upon said hearings; nor does it appear that he was present by the request of the county, or by subpoena, as a witness for the county. The judgment is affirmed.

Street, C. J., Davis, J., and Doan, J., concur.

[Civil No. 614. Filed April 16, 1898.]

[52 Pac. 1127.]

COUNTY OF COCONINO, Plaintiff and Appellant, v.
COUNTY OF YAVAPAI, Defendant and Appellee.

1. COUNTIES—DIVISION OF—INDEBTEDNESS—ACT OF FEBRUARY 19, 1891, AND ACT OF MARCH 12, 1885, CITED—BONDS—IN AID OF PRESCOTT AND ARIZONA RAILWAY COMPANY, ISSUED BY YAVAPAI COUNTY, VALID BY ACT OF CONGRESS APPROVED JUNE 6, 1896.—The act of February 19, 1891, *supra*, created the county of Coconino out of the county of Yavapai, and provided that one third of the indebtedness of the latter should be assumed and paid by the former by means of bonds, which the county of Yavapai was authorized to accept and dispose of for its own benefit. A portion of the indebtedness assumed by the county of Coconino, and for which bonds were issued, was on account of bonds issued by Yavapai County in aid of the Prescott and Arizona Railway Company, under act of March 12, 1885, *supra*. In an action brought by Coconino County to recover the amount paid on account of such railway aid bonds, a demurrer to the complaint was properly sustained, said railway aid bonds having been validated by the act of Congress approved June 6, 1896, *supra*.
 2. SAME—SAME—SAME—PLEADING—SUFFICIENCY OF COMPLAINT.—In an action by the county of Coconino against the county of Yavapai to recover a portion of indebtedness assumed under the County Division Act, represented by railway aid bonds alleged to be void, a demurrer to the complaint is properly sustained, it alleging that many of the bonds, covering the amount sought to be recovered, executed and delivered by Coconino County to Yavapai County, had been sold and delivered to sundry persons, and the remainder funded under the Territorial Funding Act before the suit was brought, and failing to show that said railway aid bonds were not still an outstanding and a subsisting indebtedness against Yavapai County. Said Coconino County being a portion of Yavapai County at the time the bonds were issued, must be held to bear its portion of the burden.
- AFFIRMED. 176 U. S. 681; 44 L. Ed. 637; 20 Sup. Ct. 1025.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Yavapai.
R. E. Sloan, Judge. Affirmed.

The facts are stated in the opinion.

E. S. Clark, District Attorney, and Edward M. Doe, for Appellant.

H. D. Ross, District Attorney, and P. W. O'Sullivan, Assistant District Attorney, for Appellee.

STREET, C. J.—The thirteenth legislative assembly of Arizona on the twelfth day of March, 1885, passed an act to aid in the construction of a railroad in Yavapai County, which authorized the issuance of bonds on the faith and credit of Yavapai County to the amount of four thousand dollars per mile for the construction of a railroad from a point near Chino Station, on the Atlantic and Pacific Railroad, to Prescott and to the northern boundary of Maricopa County. Soon thereafter was constructed the Prescott and Arizona Central Railroad from a point near Chino Station, called Seligman, to the city of Prescott, all in Yavapai County, Arizona; and the bonds of Yavapai County were issued to the company constructing said railroad to the number of two hundred and ninety-two, and in the denomination of one thousand dollars each. At that time the territory now embraced in Coconino County was a part of Yavapai County. The sixteenth legislative assembly of Arizona on the 19th of February, 1891, created the county of Coconino out of certain territory then belonging to Yavapai County. By the act creating the county of Coconino it was provided that one third of the indebtedness of Yavapai County, less twenty-five thousand dollars (the same being one third of the estimated valuation of the public improvements in said county of Yavapai at the time of the passage of the act), shall be assumed and paid by the county of Coconino to the county of Yavapai; and that the county of Coconino should issue to the county of Yavapai negotiable coupon bonds covering all indebtedness, bearing interest at the rate of seven per cent per annum, and that said bonds should be delivered to the treasurer of Yavapai County; and Yavapai County was authorized to take, own, and hold the said bonds, and through its board of supervisors dispose of and transfer the same to the benefit of said Yavapai County. In compliance with said act the boards of supervisors of the respective counties met at the city of Prescott, and ascertained the amount of indebtedness of Yavapai County as it existed on the nineteenth day of February, 1891, the date of the passage of said act, to be the sum of \$533,926.50, and the proportion of said indebtedness belonging

to Coconino County to be the sum of \$152,975.50. Thereafter, on the second day of June, 1891, the said board of supervisors of Coconino County made, executed, and delivered to Yavapai County one hundred and fifty-three negotiable bonds dated May 1, 1891, bearing interest at the rate of seven per cent per annum, interest payable annually on the second day of January of each year. Each of said bonds except the last one, numbered 153, was for the principal sum of one thousand dollars, and said bond numbered 153 was for the principal sum of \$975.50. It is alleged by plaintiff that on the nineteenth day of February, 1891, the sum of \$294,779.84, which was included in the total amount of indebtedness of Yavapai County, was for and on account of the bonds which had been issued and delivered to the Prescott and Arizona Central Railroad Company under and by virtue of the act of the thirteenth legislative assembly aforesaid, that the said act of the thirteenth legislative assembly was void, and that the sum of \$98,259.32 is the proportion which Coconino County assumed to pay to Yavapai County of said void bonds. This action was brought by Coconino County to recover the said sum of \$98,259.32, together with interest thereon, which Coconino County had paid to Yavapai County, from the date of said bonds to the 15th of January, 1895. To this complaint the defendant, Yavapai County, filed a demurrer, which the district court of Yavapai County sustained, and rendered judgment thereon in favor of the defendant, from which judgment the plaintiff appeals to this court.

The questions raised by the plaintiff in his brief are: First, whether the bonds given by Yavapai County in aid of the Arizona Central Railroad Company were void when issued; second, whether, if then void, the act of Congress entitled "An act amending and extending the provisions of Congress entitled 'An act approving with amendments the Funding Act of Arizona, approved June 25th, 1890, and the act amendatory and supplemental thereof, approved August 3d, 1894,' " approved June 6, 1896, is applicable to said bonds. Whether or not the act of March 12, 1885, of the thirteenth legislative assembly authorizing Yavapai County to issue bonds for the construction of said railroad was within the power of the legislature to enact, or whether the bonds that were issued in pursuance of said act were originally valid or

not, this court does not feel called upon to decide, for the view we take of the matter is, that the validity of the bonds is to be determined by the act of Congress approved June 6, 1896, section 2 of which is as follows: "That all bonds and other evidences of indebtedness heretofore funded by the loan commission of Arizona, under the provisions of the act of Congress approved June 25th, 1890, and the act amendatory thereof and supplemental thereto approved August 3d, 1894, are hereby declared to be valid and legal for the purposes for which they were issued and funded; and all bonds and other evidences of indebtedness heretofore issued under the authority of the legislature of said territory as hereinbefore authorized to be funded are hereby confirmed, approved, and validated; and may be funded as in this act provided until January first, 1897, provided that nothing in this act shall be so construed as to make the government of the United States liable or responsible for the payment of any of said bonds, warrants, or other evidences of indebtedness by this act approved, confirmed, and made valid and authorized to be funded." Under that act all bonds which had been issued by virtue of the territorial legislative enactments were permitted to be funded in territorial funding bonds. The act of Congress aforesaid made valid all of the bonds which were issued under the legislative act of March 12, 1885. That the act of Congress was intended to meet the question of bonds issued under the legislative act of March 12, 1885, is made more certain, and the construction of the language of it becomes more easy of interpretation, under the history which surrounds its passage. The territorial legislative assembly of 1895 passed a memorial asking Congress for an enactment of some such law, the text of which memorial is as follows: "Whereas, under the various acts of the legislative assembly of the territory of Arizona, certain of the counties of the territory were authorized to issue in aid of railroads and other quasi-public improvements, and did under such acts issue, bonds, which said bonds were sold in open market, in most instances at their face value, and are now held at home and abroad by persons who in good faith invested their money in the same, and, save and except such knowledge as the law imputes to the holder of bonds issued under authorized acts, are innocent holders of the same; and whereas, the validity of

these bonds for many years after their issuance was unquestioned, and acknowledged by the payment of the interest thereon as it fell due; and whereas, there has recently been raised a question as to whether these acts of the legislative assembly were valid under the organic law of the territory, which had led to a movement looking to the repudiation of the indebtedness created under and by virtue of such acts; and whereas, we believe that such repudiation would under the circumstances work great wrong and hardship to the holders of such bonds, and at the same time most seriously affect the credit and standing of our people for honesty and fair dealing and bring us into disrepute; wherefore we most strongly urge upon your most honorable bodies the propriety and justice of passing such curative and remedial legislation as will protect the holders of all bonds issued under the authority of acts of the legislative assembly, the validity of which has heretofore been acknowledged, and that you further legislate as to protect all innocent parties having entered into contracts resulting from inducements offered by our territorial legislation, and relieve the people of the territory from the disastrous effects that must necessarily follow any repudiation of good faith on the part of the territory, and that you may so further legislate as to validate all acts of the legislative assembly of the territory which have held out inducements for the investment of capital within the territory, and which have led to the investment of large sums of money in enterprises directly contributing to the development and growth of the territory, and thus relieve the honest people of the territory from the disastrous effects that must necessarily follow any violation of good faith on the part of our people: *Resolved*, That our delegate to Congress be, and he is hereby, instructed to use all honorable means to bring this subject to the earnest consideration of Congress; that the secretary of the territory be, and he is hereby, requested to transmit a copy of the foregoing memorial to each house of Congress, and to our delegate in Congress."

Another reason why the demurrer was properly sustained is, that the plaintiff alleges that many of the said one hundred and fifty-three bonds, covering the amount of \$98,259.32, executed and delivered by Coconino County to Yavapai County, have been sold and delivered to divers and sundry persons, and

the remainder exchanged for territorial funding bonds, under the territorial Funding Act and the act of Congress providing for the funding of territorial and county indebtedness; and it was shown by the complaint that the same had been done before this action was brought, and failed to show any other condition than that the obligation of Yavapai County on the bonds issued by it to the Prescott and Arizona Central Railroad Company was outstanding and remained as a Yavapai County liability and indebtedness. For aught this court knows, there may be already a judgment against Yavapai County, making it compulsory upon that county to pay these railroad bonds. Until Yavapai County is relieved of its obligation to pay the bonds issued by it for the construction of the railroad, Coconino County, which was a portion of Yavapai County at the time the bonds were issued, must be held to bear its portion of the burden. The judgment of the district court is affirmed.

Davis, J., and Doan, J., concur.

Sloan, J., having been judge in the court below, did not sit in this case in supreme court.

[Civil No. 596. Filed April 16, 1898.]

[53 Pac. 173.]

GEORGE W. OAKES, Defendant and Appellant, v. S. W. FINLAY, Plaintiff and Appellee.

1. ELECTIONS — CONTEST — EVIDENCE — RETURNS OF ELECTION BOARD — CONCLUSIVE UPON CANVASSING BOARD — PRIMA FACIE IN ELECTION CONTEST — BURDEN OF PROOF ON PERSON ASSAILING CORRECTNESS. — The returns of an election board, when legally and properly authenticated, are not only conclusive upon the board of canvassing officers, but are also *prima facie* evidence of the number of votes cast, in a proceeding to contest the election; and the burden of proof is upon the person who assails the correctness of these returns.
2. SAME — SAME — SAME — BALLOTS — RECOUNT OF ORIGINAL OVERCOMES RETURNS. — Where the identical ballots cast at the election have been properly preserved so they can be recounted by the order

of the court, they will govern when there is a difference between them and the returns.

3. ~~SAME—SAME—SAME—SAME~~—IDENTITY MUST BE PROVEN BEFORE RE-COUNT.—One who relies upon overcoming the *prima facie* correctness of the official canvass by a resort to the ballots must first show that the ballots as presented to the court are intact and genuine.
4. ~~SAME—SAME—SAME—SAME~~—PAROL TESTIMONY AS TO BALLOTS—ADMISSIBILITY.—Where the ballots rejected by the election board were not before the court in the same condition as when voted, it is error to receive parol testimony as to how they were marked to reverse or disturb the returns made by the canvassing board.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. J. D. Bethune, Judge. Reversed.

The facts are stated in the opinion.

Thomas F. Wilson, James A. Zabriskie, Charles W. Bowman, and C. W. Wright, for Appellant.

The court erred in receiving parol evidence of the contents of ten rejected ballots. In the findings in this case made by the lower court, it says: "Positive evidence was given before the court that the ten rejected votes which were taken from the package that had been opened in this court were not the same ten that were rejected. Notwithstanding there was conclusive evidence that the package had not been broken since it was sealed up by the election officers, and that it was intact. Upon the evidence that these were not the same ten ballots the court rejected them entirely and received evidence of what the ten votes were."

This was error. In the case of *Hudson v. Solomon*, 19 Kan. 186, opinion by Mr. Justice Brewer, the court having under consideration this identical question, sums up its conclusions in these words:—

"1st. As between the ballots cast at an election and a canvass of these ballots by the election officers, the former are the primary, the controlling evidence.

"2d. In order to continue the ballots as controlling evidence, it must appear that they have been preserved in the manner and by the officers prescribed in the statute, and that while in such custody they have not been so exposed to the

reach of unauthorized persons as to afford a reasonable probability of their having been changed or tampered with.

"As between, therefore, the ballots themselves and a canvass of the ballots, the ballots are controlling. This is of course upon the supposition that we have before us the very ballots that were cast by the voters."

It follows that next in rank to "the very ballots that were cast by the voters" the official canvass of the ballots comes; for if the procedure is to be adopted that was pursued in this case our elections would degenerate into a farce; they would cease to be a question of the will of the majority, and would drift into a swearing-match between the political hacks of the rival candidates, with a probably strong bias in the mind of the judge for the candidate of his political faith.

For these reasons, it has been held that it is error to hear oral evidence as to the contents of a lost ballot, as the canvass of the ballots in such case must control. *Spidle v. McCracken*, 45 Kan. 356, 25 Pac. 897; *People v. French*, 45 Cal. 241; *Kingley v. Berry*, 94 Ill. 515; *McCreary on Elections*, sec. 439.

Barnes & Martin, for Appellee.

DOAN, J.—This was an action brought in the district court of Pima County, by Samuel W. Finlay against George W. Oakes, to contest an election held in the city of Tucson, Arizona, on the fourteenth day of December, 1896, at which the parties to this suit were rival candidates for the office of city marshal. The returns of the election board showed that Oakes received at said election three hundred and eleven votes; that Finlay received three hundred votes. The city council of the city of Tucson thereafter, on the sixteenth day of December, met, and canvassed the returns, and declared that Oakes, the appellant, was duly elected to the office of said marshal, and issued to him the certificate of such election. The appellee, Finlay, complained in his petition that the election board in wards Nos. 1 and 2 of said city did not correctly count the ballots cast at such election, but said boards counted ten ballots for Oakes in each ward which should have been counted for Finlay. The case was tried to the court without a jury at a special term of district court,

on the fourth day of January, 1897; Messrs. Barnes & Martin and Charles Blenman appearing as counsel for S. W. Finlay, contestant, and Messrs. Thomas F. Wilson and Charles Bowman appeared as attorneys for George Oakes, contestee. The ballots cast at the said election were presented and offered in evidence. They were sealed up in two packages, one package indorsed across the folds as follows:—

“Official Ballots, Ward No. 1.

“Chas. Bowman, Inspector. Chas. H. Meyer, Geo. M. Williams, Chas. T. Connell, Judges.

“Filed Dec. 15th, 1896. R. A. J.

“Rec'd from R. A. J., Jan. 4th, 1897. Chas. F. Hoff, County Treas.”

The other package (Ward No. 2) indorsed as follows, across folds:—

“Chas. T. Connell. John E. Magee, Inspector. H. Urquides, W. C. McDuffie, Judges. A. B. Spencer, Clerk.

S. B. Conley, Clerk. R. B. Kelly, Clerk.

Thos. A. Borton, Clerk.

“Filed Dec. 15th, 1896. R. A. J.

“Rec'd from R. A. J., Jan. 4th, 1897. Chas. F. Hoff, Co. Treasurer.”

The packages were inclosed in brown paper wrappers, folded at each end, with a string passing round the ends and the sides, sealed with wax over the fold and over the string. The testimony of the clerks and judges of election agree that the packages appeared not to have been opened since sealing until opened in court. Charles T. Connell, recorder, testified “that the package of the Second Ward appeared to have been unopened”; “that it was not opened by him while in his possession; that his name as it appeared on the package was not as he had indorsed across the package when presented to him; that the initial letter ‘T’ in his name was written at the point where the paper lapped, or where the fold was made; that the letter ‘T’ as it appeared on the package when presented in court was not his writing; that he had not written it.” When the packages were opened, there was a large string of ballots showing those voted and counted. Of the ballots to which there was no objection made by either party, there

were for contestant, Finlay, three hundred and one votes, and for contestee, Oakes, three hundred and eleven votes. In the package from the first ward, there were found seven rejected ballots on the string by themselves, and the contestant demanded that they be counted for him, which the contestee, Oakes, resisted. The court ruled that the said seven ballots be counted for contestant, Finlay, to which ruling contestee, Oakes, excepted. In the package of ballots for the second ward, besides the string of ballots that had been voted and counted, there was also a string of ten ballots purporting to be ten ballots that were rejected by the board, and counted for no one. The testimony of the officers of the election agreed to the effect that these were not the ten ballots that had been rejected by the board. The trial court held that they were not the ballots that had been voted and rejected in the count, to which ruling contestant excepted. The court then received the testimony of the officers of the election and some others as to the contents of the ten rejected ballots which these purported to be, and from the oral testimony then given decided that seven votes of the ten that had been rejected should be counted for the contestant. The court therefore held that there should be counted for Finlay three hundred and one votes, as shown by the returns and supported by the recount of the ballots, and to these there should be added seven as shown by the rejected ballots from the first ward, and seven others, as indicated by the testimony in regard to the ten votes rejected by the canvassing board in the second ward, and that these fourteen, added to the three hundred and one already returned for Finlay, would make the total of three hundred and fifteen votes, as against the three hundred and eleven for the contestee, Oakes. The court therefore found that Finlay was elected to the office, and gave judgment accordingly, from which judgment and the order denying a new trial contestee appealed, and brings the case to this court.

The appellant has presented one assignment of error: "That the court erred in receiving parol evidence of the contents of the ten rejected ballots." This seems to be the only legal issue presented in the case. The only question to be considered is whether the court erred in receiving parol testimony as to the contents of the ten rejected ballots in the sec-

ond ward, after it was satisfied that the ten ballots appearing on the string as rejected ballots in the package from that ward were not the identical ballots that had been voted by the electors and rejected by the returning board, and in deciding on the testimony thus received that seven of those ten ballots should be counted for the contestant; the seven ballots thus added to the count for the contestant being sufficient to change the result of the election, and entitle him by a majority of four to the position and the emoluments of the office. This court is not called on to determine whether or not the reasoning of the lower court was correct and the conclusion arrived at the proper and logical one, from the manner in which the ballots were worded and marked, as indicated by the testimony given by the witnesses; but the legal proposition presented by the appellant is, that it was error on the part of the court to interfere with or overturn the return of the election board, and the findings of the canvassing board based thereon, upon any evidence other than the identical ballots that were cast at the election by the voters, and on which the election board made their return.

In determining the results of our popular elections it has been generally held that the returns from the election board, when legally and properly authenticated, are not only conclusive upon the board of canvassing officers, but are also *prima facie* evidence of the number of votes cast in a proceeding to contest the election; and the burden of proof is upon the person who assails the correctness of these returns. It has likewise been generally held that where the identical ballots that were cast at the election have been properly preserved so that they can be recounted by the order of the court, they will govern when there is a difference between them and the returns; but it has been held, in the revision of the returns or in a contest over the count as made by the canvassing board, that while the ballots are the best evidence of the manner in which the electors have voted, being silent witnesses which can neither err nor lie, they are the best evidence only when their integrity can be satisfactorily established. One who relies, therefore, upon overcoming the *prima facie* correctness of the official canvass by a resort to the ballots, must first show that the ballots as presented to the court are intact and genuine. *Tebbe v. Smith*, 108 Cal. 101, 49 Am. St.

Rep. 68, 29 L. R. A. 673, 41 Pac. 454. In cases where there has been a doubt in regard to the genuineness or identity of the ballots as those that were actually cast, or in regard to the further question whether the identical ballots cast were in the same condition when presented in court as when voted at the election, the courts have been extremely careful in admitting them in evidence to overturn or contradict the result of the election as shown by the returns of the canvassing board. To preserve the prevailing force of the ballots as evidence there must be a reasonable observance of all the prescribed conditions for the safe-keeping of the ballots. It is the duty of the court so far to adhere to the substantial requirements of the law in regard to elections as to preserve them from abuses subversive of the rights of electors. And under this view the question becomes a broader one than can be disposed of by answering that in the individual case no harm resulted.

As to the controlling force of the ballots as evidence contradistinguished from the returns of the election officers, *Spidle v. McCracken*, 45 Kan. 356, 25 Pac. 897, holds: "That the returns of the election officers are *prima facie* evidence of what they purport to show with regard to the number of votes cast, and for whom cast, has primarily been held by this court, and has been so held by every other court to whom the question has been presented; and, in the absence of any contradictory evidence, they are conclusive. It has also been held by this court in the case of *Dorey v. Lynn*, 31 Kan. 758, 3 Pac. 557, and in other cases, that, whenever the ballots cast at the election can be properly identified, they are the best evidence, and much better and more reliable than a mere abstract or summary of the same made by the election officers; but whenever it has been shown that they have been wrongfully tampered with (as has been shown in the present case), they lose their controlling character as evidence, and, where there is nothing else than these discredited ballots to contradict, the returns will be held conclusive." This decision was rendered in a case where unquestionably the ballots presented were the identical ballots that had been cast; but the evidence before the court did not sustain the fact that they had been inviolably kept from the election until presented in court. On the contrary, their appearance seemed very strongly

to indicate that they had been altered and presented a different appearance when offered in court than when passed upon by the returning board.

In the case at bar the trial court ruled that the ballots presented as the rejected list in the package were not the ballots that had been voted and rejected in the count. Neither does there appear to have been clear and conclusive proof of the character and contents of the ballots that were rejected. John E. Magee, the inspector at the election, testified "these ballots are not as we left them." On being asked by the court to explain, witness, referring to a memorandum which he testified was made the night of the election, testified: "The ballots we rejected, two of them were blank, one was marked for both tickets. Five of them were marked by crosses on the extreme right hand of the ticket in the empty space, outside of the little squares, and two were marked partly in the empty space at the extreme right hand, and partly in the blank space where the names of the candidates were; while these ten ballots, which I find in this package, are marked, one blank, one for all of the candidates on both tickets, and all the rest in the small squares on the right hand." S. B. Conley, one of the clerks, testified: "There was also a string of ten rejected ballots in the package. The ballots on this string of ten ballots are not those ballots. The rejected ballots had four or five marked by crosses at the extreme outer edge of the ballots at the right-hand side. Two were blank ballots. One had all the candidates on both tickets voted for. The remaining number were some of them marked in the squares at the right hand of the ballot, and some of them were outside of the square in the empty space at the right. While these ten ballots here in this package are marked as follows: One is blank, and the remaining nine are all marked in the little square in the third space at the right of the ballot, and none are marked in the empty space like those that were rejected by the election officers." Fred G. Hughes testified: "I think the ten rejected ballots that are here are the same ten ballots that were rejected by the election board, but I am not sure. I am positive that one of them is the same. I was not an election officer." This appears to be all the testimony relative to the identity of the ballots as found in the package or the manner of marking the ones which were rejected, and

which had either been destroyed by the election judges, instead of being filed as required, or had been subsequently removed from the files and these ten substituted for them. From the testimony given by these officers of the election and bystanders, the court reasoned out the conclusion in regard to how the ten rejected ballots should have been counted; and without the ballots before him claiming to be the rejected ballots in question he ruled that seven of those ballots should be counted for the contestant and the other three counted for no one. It is not the correctness of that conclusion as based upon the testimony given that is questioned; but it is the right of the court to make any finding or arrive at any conclusion in regard to those ballots on any other evidence than the ballots themselves, and present that finding as of a sufficiently controlling character to overturn the finding already made by the election board that is resisted. The ballots were canvassed by the returning board at the close of the day of the election. They had before them the ballots that had been cast. They made their returns, in which they certified the number of votes cast for each candidate. These returns constitute the highest evidence that can be adduced in support of that fact, with the one single exception of the recount in court of the identical ballots that were cast; and the return thus made cannot be overturned or set aside upon any other evidence than upon a recount in court of the identical ballots that were thus counted by the returning board at the date of the election. If that is done, and by that count made under the direction of the court a mistaken return by the canvassing board is demonstrated, that, and that alone, is of a sufficiently controlling character to overturn the finding already made.

In *Young v. Deming*, 9 Utah, 204, 33 Pac. 818, the supreme court of Utah held that "the fact that such ballots, if cast for contestant, would have changed the result of the election, is not ground for disturbing the result as returned by the inspectors, in the absence of positive evidence that they were so cast." The court said it is deemed unwise to lay down any rule by which the certainty and accuracy of an election may be jeopardized by the reliance upon any proof affecting such results that is not of the most clear and conclusive character. The temptation to actual fraud and corruption on the part of the candidates and their political supporters is never so great as

when it is known precisely how many votes it will take to change the result; and men who are willing to sell their votes before election will quite as readily sell their testimony afterwards, especially as the means of detecting perjury and falsehood are not always at hand until after the wrong sought to be accomplished by it has become successful and the honest will of the people has been thwarted. In *People v. Sackett*, 14 Mich. 320, the court holds that the returns of the inspectors is *prima facie* evidence of the result of an election, and that where the ballots have not been preserved in the manner required by law, but have been left in an exposed condition or destroyed, the presumption that would otherwise exist of their correctness is not raised, and the court may properly be governed by the returns, unless fully convinced by proof of the integrity of the ballot. "These ballots having been improperly destroyed, and the judges not having certified that they were cast for Mr. Young, we think the evidence that these six ballots were cast for Mr. Young is insufficient to justify that finding, and that the judgment entered in favor of the plaintiff and contestant should be reversed, with costs and the case remanded for further proceedings." We agree fully with the finding of the court as above laid down, and hold that when the court was satisfied that the ten ballots that had been voted that day and that had been rejected by the election board were not before the court and in the same condition as when voted, the court could not upon any other evidence reverse or disturb the returns made by the canvassing board. And although the court might feel satisfied from the testimony of the witnesses as to how ballots marked as they describe should have been counted, it was error for the court to substitute this conclusion in the matter for the decision of the election board made when they had the ballots before them, in regard to the manner of the marking, of which there could be no mistake. It is less dangerous to lay down the doctrine that the return of the election boards should be upheld, even when the testimony of witnesses who testify from their recollection differs from these returns, than to lay down as a principle of law that the returns of our election boards, as supported by the recount of the ballots which have been regularly and legally preserved, can be overturned by the parol testimony of witnesses who would come upon the stand

weeks after the election and testify from their recollection as to the number and kind of ballots that may have been rejected and not counted by the boards to whom have been intrusted the interpretation and count of the ballots cast. The judgment is therefore reversed and the case remanded, with directions to the district court to enter judgment for the contestee.

Street, C. J., Sloan, J., and Davis, J., concur.

[Civil No. 597. Filed April 16, 1898.]

[53 Pac. 176.]

GEORGE PUSCH, Defendant and Appellant, v. R. G.
BRADY, Plaintiff and Appellee.

1. ELECTIONS—CONTEST—OFFICIAL CANVASS—PRIMA FACIE CORRECT—MAY BE OVERCOME BY RECOUNT OF BALLOTS CAST.—In a contested election case, the *prima facie* correctness of the official canvass stands until overcome by a recount of the ballots cast.
2. SAME—SAME—BALLOTS—EVIDENCE—ADMISSIBILITY.—The ballots that were cast at the election, and which have been preserved in compliance with the mode prescribed by statute, are admissible in evidence to overcome the *prima facie* correctness of the official canvass. Only those ballots which were actually voted at the election will be counted in the recount before the court for that purpose.
3. SAME—SAME—SAME—REJECTED BALLOTS—MAY BE ADDED TO COUNT WHERE ENTITLED TO BE.—Ballots voted at the election which were rejected by the election board, and counted in the return as "rejected ballots," found among the ballots in the recount in the contest, are evidence of what they present; and it is competent to add to the count for the contestant any ballots determined to be so entitled.
4. SAME—SAME—SAME—NOT THOSE VOTED AT ELECTION NOT ADMISSIBLE—PAROL TESTIMONY AS TO HOW VOTED NOT ADMISSIBLE.—Ballots presented in a contest, and found by the court not to be the same ballots that were voted at the election, have no controlling effect; and oral testimony as to the similarity of said ballots to those rejected, or as to how the rejected ballots were marked, or what they would show if presented, or for what candidate voted, is not admissible to authorize such ballots to be counted.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. J. D. Bethune, Judge. Reversed.

The facts are stated in the opinion.

Charles W. Bowman, and C. W. Wright, for Appellant.

Barnes & Martin, for Appellee.

For briefs, see case of *Oakes v. Finlay*, ante, p. 390.

DOAN, J.—This was an action brought in the district court of Pima County, by R. G. Brady against George Pusch, to contest an election held in the city of Tucson, Arizona, on the fourteenth day of December, 1896, at which the parties above named were candidates for the office of councilman of the second ward of the city of Tucson. The returns of the election board showed that George Pusch received one hundred and fifty-four votes, and that R. G. Brady received one hundred and fifty-one votes. The city council of the city of Tucson thereafter, on the sixteenth day of December, met and canvassed the returns, and declared that George Pusch, the appellant, was duly elected to the office of councilman of the second ward of the said city of Tucson, and issued to him the certificate of such election. The appellee, R. G. Brady, filed his petition in the district court, and alleged that the board of election in the second ward of the said city did not correctly count the ballots cast at said election in the said ward, and demanded a recount by the court of the votes cast at said election in the said second ward of the said city for the said office of councilman of the second ward, and that upon such count the court give to the petitioner the votes legally cast for him for said office of councilman, and find and determine what number of votes in the said second ward of said city at the said election were cast for the petitioner and for the appellant herein. The case was tried to the court, sitting without a jury, at a special term of the district court of Pima County, on the fourth day of January, 1897; Messrs. Barnes & Martin and Charles Blenman appearing as counsel for R. G. Brady, contestant, and Messrs. Thomas F. Wilson and Charles Bowman appearing as attorneys for George Pusch, contestee. Witnesses on the part of contestant and contestee

were sworn and examined. The ballots cast at the said election were presented and offered in evidence. The ballots that has been voted and counted for the several candidates, including the two contestants, were strung upon a long string. There were ten ballots, marked "Exhibit A," strung upon a short string, and purporting to have been rejected and not counted by the election board. The officers of the election board having testified that these were not the ballots that had been rejected by them, the court sustained the "motion of counsel for contestee that the ten rejected ballots filed as Exhibit A be not counted." Of the ballots to which there was no objection made by either party, there were for contestant, Brady, one hundred and fifty-three, and for contestee, Pusch, one hundred and fifty-four. S. B. Conley, one of the election board, testified that "the ballots on the string of ten ballots found in the package are not the ten ballots rejected by the election board. Of the ten ballots which were rejected, Exhibit 1 is a facsimile of seven of them that were, as a matter of fact, rejected by the election board." J. E. Magee, the inspector of the election, testified substantially the same as Conley on this point. Fred G. Hughes testified that seven of the ten rejected ballots were marked just like the ones on the string, and he thought they were the same ones, but could not be sure. The court thereupon held that seven of the votes represented by the ballots thus rejected be counted for contestant, Brady. Contestee objected on the ground that as these were not the identical ballots the court could not hear oral testimony to show the contents of the ballots that had been rejected, which objection the court overruled. The court thereafter held that there were one hundred and fifty-three votes cast for contestant, Brady, in the said second ward which were not objected to, and one ballot found in the package counted for Brady, and of the ten rejected votes the court ordered that there should be added seven votes, making the total for Brady, contestant, one hundred and sixty-one votes, as against one hundred and fifty-four votes for contestee, Pusch. The court therefore found that Brady was elected to said office, and gave judgment accordingly, from which judgment and the order denying a new trial contestee appealed, and brings the case to this court.

The appellant has presented one assignment of error, that

"The court erred in receiving parol evidence of the contents of the ten rejected ballots." Following the authorities cited and the decision rendered in the case of *Oakes v. Finlay* (just decided by this court), *ante*, p. 390, 53 Pac. 173, we hold that in a contested election case the *prima facie* correctness of the official canvass stands until overcome by a recount of the ballots cast. The ballots that were cast at the election, and which have been preserved in compliance with the mode prescribed by statute, are admissible in evidence to overcome the *prima facie* correctness of the official canvass. But when a resort to the ballots is had to overcome the returns of the election as shown by the official canvass only those ballots will be counted in the recount before the court for that purpose which were actually voted at the election. The ballots voted at the election which were rejected by the election board, and counted in the returns as "Rejected ballots," and are found among the ballots on the recount in the contest, are evidence of what they present; and it is competent for the court to add to the count for contestants any ballots from such list that he may determine from a careful and critical examination to be so entitled; but a string of ballots marked "Rejected ballots," taken from the package of ballots presented in the contest, and found by the court not to be the same ballots that were voted at the election, have no controlling effect; and the oral testimony of election officers and bystanders as to the similarity of said ballots to those that were rejected, or in regard to how the ballots which were actually rejected were marked, or what they would show if presented, or for what candidate voted, is not admissible to authorize such ballots to be counted for the contestant, as one of several candidates voted for on said ballots at such election. *Hartman v. Young*, 17 Or. 150, 11 Am. St. Rep. 787, 2 L. R. A. 596, 20 Pac. 17. In this instance the recount of the ballots actually voted at the election supported the returns as shown by the official canvass. The *prima facie* correctness of the returns thus supported by a recount of the ballots actually cast, and the presumption that the election officers discharged their duties faithfully and correctly, are of more controlling character than the parol testimony of witnesses in regard to how the rejected ballots were voted, unsupported by the ballots thus claimed to have been im-

properly rejected, given after election, and when it is known that a certain number of votes would change the result of the election. Such evidence should not be permitted to disturb the result of the election as shown by the official returns and thus supported by a recount of the ballots actually cast. The judgment is therefore reversed and the case remanded, with direction to the district court to enter judgment for the contestee.

Street, C. J., Sloan, J., and Davis, J., concur.

[Civil No. 577. Filed April 16, 1898.]

[52 Pac. 773.]

UNITED STATES OF AMERICA, Plaintiff and Appellant,
v. SIMON MARKS et al., Defendants and Appellees.

1. APPEAL AND ERROR—REVIEW—ERROR IN ADMISSION OF EVIDENCE—EVIDENCE RECEIVED SUBJECT TO OBJECTION—PRESUMPTION—REVIEW LIMITED TO WHETHER JUDGMENT IS SUPPORTED BY COMPETENT EVIDENCE.—The judgment of the trial court will not be reversed for error in the admission of evidence where the record shows that the trial was before the court sitting without a jury, and that evidence was received subject to objection, which was not ruled upon, and fails to show what evidence was considered by the court in reaching its decision. This court will examine the record under these circumstances for the purpose of determining whether the competent evidence sustains the judgment, assuming, if that be true, that the lower court disregarded that which was incompetent.
2. POST-OFFICE—ACTION TO RECOVER MONEYS ILLEGALLY RETAINED—EVIDENCE—ORDER OF POSTMASTER-GENERAL—CERTIFIED COPY OF DEPARTMENT ACCOUNT—1 SUPP. REV. STATS. U. S., CHAP. 259, SEC. 1, P. 358, AND REV. STATS. U. S., SEC. 889, CONSTRUED.—In an action by the United States against a postmaster for moneys illegally retained, an order made by the postmaster-general declaring that defendant had made false returns of the business of his post-office and ordering a readjustment of his account, under section 1, *supra*, a statement of account prepared by the department based thereon, showing a balance due to the government from defendant, duly certified, is competent evidence under section 889, *supra*.
3. SAME—SAME—SAME—PRIMA FACIE—MAY BE REBUTTED—1 SUPP. REV. STATS. U. S., CHAP. 259, SEC. 1, P. 358, AND REV. STATS. U. S., SEC. 889, CONSTRUED.—In an action by the United States against a

postmaster for moneys illegally retained, an order made by the postmaster-general declaring that defendant has made false returns, and ordering a readjustment of his accounts, under section 1, *supra*, a statement of account based thereon showing a balance due the government from defendant duly certified, his official bond, and a demand on defendant for the amount due, while making a *prima facie* case against defendant, is not conclusive, and may be rebutted by competent evidence.

APPEAL from a judgment of the District Court of the First Judicial District. J. D. Bethune, Judge. Affirmed.

The facts are stated in the opinion.

E. E. Ellinwood, United States District Attorney, for Appellant.

Barnes & Martin, for Appellees.

DAVIS, J.—This was an action brought by the United States to recover from Simon Marks and the sureties on his official bond money alleged to have been illegally retained by him, while postmaster at Contention, Cochise County, Arizona. The defendants denied any indebtedness,—and set up as a counterclaim an amount alleged to be due from the United States to the said Marks for his services as such postmaster, in accordance with the quarterly accounts rendered by him to the plaintiff. It appears from the record that Simon Marks was postmaster at the place named from May, 1883, to December 31, 1885, at which time his postal accounts were audited by the department at Washington, showing a balance in his favor of \$597.30; that at the appellant's request he executed and forwarded to the department a proper receipt for this amount, but that neither the said sum nor any part thereof has been paid to him. It further appears that a subsequent examination of said Marks's accounts by the post-office department resulted in a claim that he had made false returns of the business done at the Contention post-office, and that the following order was issued by the postmaster-general in relation thereto: "Order No. 454. Post-Office Department. Office of the Postmaster-General, Washington, D. C., October 27, 1887. Being satisfied that S. Marks, late P. M., Contention, Cochise Co., Ariz., has made false returns of business at the post-office at said place during the period from April 1,

1883, to December 31, 1885, thereby increasing his compensation beyond the amount he would justly have been entitled to have by law: Now, in the exercise of the discretion conferred by the act of Congress entitled 'An act making appropriations for the service of the post-office department for the fiscal year ended June 30, 1879, and for other purposes,' approved June 17, 1878, (section 1, c. 259, p. 358, 1 Supp. Rev. St.,) I hereby withhold commissions on the returns aforesaid, and allow as compensation (in place of such commissions and in addition to box rents), deemed by me, under the circumstances, to be reasonable during the period aforesaid, the rate of \$40.00 per quarter, and the auditor is requested to adjust his accounts accordingly. [Signed] WM. F. VILAS, Postmaster-General." That the accounts of Marks were readjusted by the department on November 21, 1887, in accordance with said order, and he was charged with \$935.24 as compensation illegally retained through false returns of business, by which a debit balance was created against him of \$337.94. It was to recover this balance that the government brought its action. The case was heard before the lower court, sitting without a jury, and a judgment was rendered in favor of the defendant Marks for \$597.30 and interest. From the judgment and the order of the court overruling a motion for a new trial the government has appealed. It is assigned for error (1) that the court below excluded from evidence, upon objection of the defendants (appellees), the duly verified order (No. 454) of the postmaster-general, and (2) that the court admitted in evidence, over the objection of the plaintiff (appellant), certified copies from the department files of the affidavits of Simon Marks and four other persons, relating to the business of the Contention post-office during the years 1883, 1884, and 1885. In neither instance does the face of the record bear out the appellant's claim as to the ruling of the lower court upon the admissibility of the evidence. It does appear that both said order and the affidavits were admitted in evidence, subject to objection (which was not ruled upon), and were all before the court. It does not appear what of said evidence was considered by the court, or what excluded, in reaching its decision. Under these conditions we have felt it our duty to look into the case for the purpose of determining whether the *competent* evidence sus-

tains the judgment, for, if that be true, then we are justified in assuming that the lower court disregarded that which was incompetent. The evidence offered by the plaintiff was wholly documentary, consisting of duly authenticated copies of Marks's official bond, the order (No. 454) of the postmaster-general, the statement of account prepared by the department based upon said order, showing a balance of \$337.94 due to the government, and the demand made for the payment thereof. The defendants introduced in evidence a certified transcript of the original department account with Marks, admitting the government owed him \$597.30; the certified copies from the department files of the affidavits of Marks and four other persons, relating to the business of the Contention post-office during the years 1883, 1884, and 1885; and placed upon the stand the principal defendant, Simon Marks, who was sworn and examined as a witness. The latter testified that he had been the postmaster at Contention during the period referred to; that while he was in charge of the office there had been a boom, and the population of the place had increased to fifteen hundred; that nearly all of the leading companies of Tombstone had principal offices at Contention, and that many of the large companies which did business at the former place brought their letters to Contention for mailing; that they also brought over amounts of money every month and paid it out at Contention; that witness got out of stamps a number of times, and had to send elsewhere than to Washington for them, buying many dollars' worth at Tombstone, and being compelled to do this to keep the office going; that later the population had decreased, and at the time when the last accounts of the office were made there were only fifty people left; that he had returned correctly to the department the business of his office from quarter to quarter, and had not made any false returns; that, after he went out of office, in 1885, he sent on his accounts to Washington; that he received a statement of debit and credit from the auditor of the post-office department stating a balance of \$597.30, and saying, "We think it is correct, and, if you find it so, please sign the inclosed blank receipt, and we will forward you the money without further delay"; that he signed and returned the receipt, and two years later received from the department the account introduced in evidence by the plaintiff.

As to the legal competency of the documentary evidence offered by the government there can be no question, for it is provided by section 889 of the Revised Statutes of the United States, that "in any civil suit in case of delinquency of any postmaster or contractor, a statement of the account, certified as aforesaid, shall be admitted in evidence, and the court shall be authorized thereupon to give judgment and award execution, subject to the provisions of law as to proceedings in such civil suits." Neither can there be any question but that the order of the postmaster-general, the bond, and the certified accounts produced by the plaintiff made a *prima facie* case. *United States v. Dumas*, 149 U. S. 278, 13 Sup. Ct. 872. But counsel for the government apparently proceeded in the court below upon the theory that this evidence was not only *prima facie* but *conclusive* of the defendants' liability. The order of the postmaster-general was made, as it recites, in the exercise of the discretion conferred by the first section of the act of Congress approved June 17, 1878, (chap. 259, 1 Supp. Rev. Stats. U. S., p. 358,) which provides "that in any case where the postmaster-general shall be satisfied that a postmaster has made a false return of business, it shall be within his discretion to withhold commissions on such returns, and to allow any compensation that under the circumstances he may deem reasonable." In the case cited of *United States v. Dumas*, *supra*, Mr. Justice Jackson, delivering the opinion of the court, said: "An order made in pursuance of this provision is certainly not conclusive upon a postmaster that his returns of business are actually false in fact, . . . neither can it be properly held that, when the postmaster-general is satisfied that a postmaster has made a false return of business, and exercises his discretion 'to withhold commissions on such returns,' his order in the matter is a final and conclusive determination that the postmaster is not entitled to any commissions as such, or that his compensation shall be absolutely fixed and limited by the allowance made. In a suit for his commissions or compensation such an order withholding the one and making a discretionary allowance as to the other would certainly not conclude the postmaster." We hold, therefore, in this case that the order, in connection with the bond and certified accounts, was merely evidence which, unexplained and uncontradicted, would have warranted a judg-

ment in favor of the government for the balance shown thereby to be due. As to the admissibility of the affidavits offered by the defendants from the department files we think there is serious doubt, notwithstanding the claim of counsel that they are made competent evidence by section 886 of the Revised Statutes of the United States. These affidavits purport to have been made on dates varying from April 18 to May 19, 1888, and were presumably placed on the files long subsequent to the issuance of the postmaster-general's order No. 454, and the readjustment by the department of Marks's accounts on the basis thereof. Under these circumstances we cannot discern the purpose for which they would be evidence in this case. But disregarding them entirely, we are of the opinion that there still remains sufficient competent evidence to sustain the judgment as rendered, and this conclusion also disposes of the two general assignments of error. The judgment of the district court is affirmed.

Street, C. J., Doan, J., and Sloan, J., concur.

[Civil No. 622. Filed April 16, 1898.]

[53 Pac. 201.]

R. E. DAGGS et al., Defendants and Plaintiffs in Error, v.
PHENIX NATIONAL BANK (a corporation), Plaintiff and Defendant in Error.

1. APPEAL AND ERROR—ASSIGNMENTS OF ERROR—STATUTES AND RULES MANDATORY—ASSIGNMENTS MUST BE SPECIFIC.—The statutes and rules of this court on the subject of assignments of error are imperative, and must be observed. It is our duty to examine into such alleged errors, and only such, as are distinctly pointed out in the record.
2. BANKS AND BANKING—NATIONAL BANKS—INTEREST—REV. STATS. U. S. 1878, SECS. 5197, 5198; REV. STATS. ARIZ. 1887, PARS. 2161, 2162, CITED AND CONSTRUED—MAY CHARGE ANY RATE AGREED UPON.—Section 5197, *supra*, provides that national banks may charge interest at the rate allowed by the territory where that bank is located, and no more, and that where no rate is fixed by such laws the rate shall be seven per cent. Section 5198, *supra*, provides that

the charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest agreed to be paid. Paragraph 2161, *supra*, provides that when there is no express agreement fixing a different rate seven per cent shall be allowed. Paragraph 2162, *supra*, provides that the parties may agree in writing for the payment of any rate of interest whatever on money due or to become due on any contract. Under these statutes a national bank in Arizona is privileged to charge and collect any rate of interest which may be agreed upon, and is as free to act in this regard as are banks organized under local laws or as individuals living in the territory.

3. PLEADING—COUNTERCLAIM — VERIFICATION — SUFFICIENCY OF UNVERIFIED DENIAL—EXCEPT AS TO MATTERS REQUIRED BY REV. STATS. ARIZ. 1887, PAR. 735, TO BE DENIED UNDER OATH.—An unverified general denial to a verified counterclaim is sufficient to put the defendant on proof, except as to any matter therein pleaded, which, by statute, *supra*, is required to be denied under oath.
4. SAME—SAME—SAME—VERIFIED ALLEGATION OF ASSIGNMENT IN WRITING ADMITTED BY FAILURE TO DENY UNDER OATH—REV. STATS. ARIZ. 1887, PAR. 735, SUBD. 5, CONSTRUED.—An allegation in a verified counterclaim that a note therein set up was assigned by the plaintiff to the defendant by an instrument in writing is admitted, under statute, *supra*, by failure to verify the denial thereof.
5. CHOSE IN ACTION — NON-NEGOTIABLE INSTRUMENT — ASSIGNOR AS SURETY—WHEN HELD—DUE DILIGENCE—REV. STATS. ARIZ. 1887, PARS. 123, 124, CITED.—While our statutes recognize the right of an assignee to hold the indorser of a non-negotiable chose in action as surety for the payment of the same, no recovery is authorized, without it be shown that the assignee has used due diligence to collect the same. Statute, *supra*, cited.
6. PLEADING — COUNTERCLAIM — SUFFICIENCY. — A counterclaim, to be good, must contain every allegation which would be needed in a complaint founded on the same cause of action.
7. SAME—SAME—SAME—AGAINST ASSIGNEE OF NON-NEGOTIABLE NOTE—MUST ALLEGE DILIGENCE IN COLLECTING—WHERE IT APPEARS THAT THERE WAS SECURITY IT MUST ALLEGE AN ATTEMPT TO ENFORCE SAME AND FAILURE.—Where a counterclaim only alleges that plaintiff assigned to defendant a non-negotiable promissory note, past due, and that at the time of the assignment the makers were insolvent, and were still insolvent, and that the same had not been paid, it fails to state a cause of action. No allegation is made that due diligence was used, as is required by statute, or that any effort was made to collect the same, which omission is doubly fatal, for the reason that it appears on the face of the note that it was secured by chattel mortgage. With this appearing, the mere allegation of the insolvency of the maker was not sufficient to charge the indorser as surety without an allegation of the exercise of due

diligence to collect the same and to enforce the security, and a failure after such effort to collect.

8. PLEADINGS—JUDGMENT ON—DENIAL—SUFFICIENCY—FACTS PLEADED INSUFFICIENT TO SUPPORT JUDGMENT.—A motion for judgment upon a verified counterclaim because there is no verified reply thereto is properly denied where it appears that there is an unverified general denial which puts in issue some of the allegations thereof, and where it further appears that, had no reply been filed, the facts pleaded were not sufficient to support a judgment therein.

AFFIRMED. 177 U. S. 549; L. Ed. 44: 882.

ERROR to the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge. Affirmed.

The facts are stated in the opinion.

A. J. Daggs, for Plaintiffs in Error.

A national bank may not charge more than seven per cent interest on any contract they may enter into in this territory. As it has contracted for ten per cent interest in this case, it has forfeited its right to recover any interest on the three notes sued on. If there is no rate fixed by law in this territory, then the laws of the United States fixing the rate to be charged by national banks governs, and contracting for a higher rate forfeits the right to collect. *Danforth v. Bank*, 48 Fed. 271; *Johnson v. Bank*, 74 N. Y. 329, 30 Am. Rep. 302. In *Danforth v. Bank*, *supra*, Atchison, J., in speaking of the operation of the United States statute (secs. 5197, 5198) upon national banks, said: "The clause operated directly upon the bank and affects its power. The statutory franchise to recover interest is lost by the commission of the illegal act. Being without right to demand interest, the offending bank cannot recover interest against any one." Also, *Bank v. Johnson*, 104 U. S. 271.

The counterclaim of plaintiffs in error, of \$1,145.65, duly verified, is not denied under oath; it stands admitted as correct. Judgment should have been given on that counterclaim. Rev. Stats. Ariz., 671, 735, subd. 11.

The counterclaim of plaintiffs in error, of the five-thousand-dollar note is a non-negotiable note on its face. Our statute (par. 122) gives life to this instrument by assignment.

Paragraph 123 gives the right to the assignee to bring an

action on it in his own name and to hold the assignor as a surety by diligence in its collection.

Paragraph 125 recognizes the liability of the assignor upon this instrument, as by the assignment this note becomes the debt of the assignor,—*Rollins v. Hope*, 18 Tex. 446,—and for that reason it is not within the statute of frauds nor the rule of *caveat emptor*.

Where the maker of a note is insolvent the assignor is liable to suit without even joining the maker. Rev. Stats. Ariz. 688.

The assignor thus becomes primarily liable as an assignor. *Flemming v. Powell*, 2 Tex. 231; *Moore v. Brown*, 15 Tex. 129; *Wood v. McMeans*, 23 Tex. 481; *Cook v. Southwick*, 9 Tex. 615; *Randon v. Barton*, 4 Tex. 289.

This counterclaim of the plaintiffs in error stands admitted on the record by the failure of the defendants in error to reply according to section 671, subdivisions 9, 10; nor was there any proof of any character offered against this part of the answer of plaintiffs in error. *Burtlett v. Stearns*, 33 Cal. 468; *Silvey v. Neary*, 59 Cal. 97.

A party cannot disprove an allegation which he has admitted by not denying it. *Bacon v. Cropsy*, 7 N. Y. 195. An admitted averment is therefore not in issue. *Bacon v. Cropsy*, *supra*.

It is therefore error to admit evidence upon matters not in issue. *Fortisque v. Crawford*, 105 N. C. 29, 10 S. E. 910; *Miller v. Miller*, 89 N. C. 209.

A general denial is not sufficient; the plaintiff must answer as the defendant would have to answer plaintiff. Where there is no answer to a counterclaim the counterclaim is admitted.

L. H. Chalmers, for Defendant in Error.

Section 5197 of the Revised Statutes of the United States allows national banks to charge the rate of interest allowed by the state to natural persons generally, and a higher rate if state banks are authorized to charge a higher rate. *Tiffany v. National Bank*, 18 Wall. 409.

Parties may agree upon any rate of interest in this territory. Rev. Stats. Ariz., sec. 2162. Under statutes permitting persons to contract for any rate, national banks have the same

privilege. *Hinds v. Marmolejo*, 60 Cal. 229; *Bank v. Bruhn*, 64 Tex. 571, 53 Am. Rep. 771; *Rockwell v. Farmers Bank*, 4 Colo. App. 562, 36 Pac. 905; *Wolverton v. Bank*, 11 Wash. 94, 39 Pac. 247; *Yakima Nat. Bank v. Knipe*, 6 Wash. 348, 33 Pac. 834; *Guild v. Bank*, 4 S. Dak. 566, 57 N. W. 499.

Where a state fixes a certain rate as the legal rate, but authorizes parties to agree in writing for a higher rate, the national banks are permitted to charge the higher rate. *Wiley v. Starbuck*, 44 Ind. 298; *Newall v. Bank*, 12 Bush. 57.

SLOAN, J.—On the twenty-eighth day of November, 1894, R. E. Daggs executed a mortgage on realty situate in Maricopa County, Arizona, and on four water-rights of the Consolidated Canal Company, represented by certificates, to the defendant in error, to secure three promissory notes, aggregating the sum of \$9,741.72, and signed by A. J. Daggs, plaintiff in error, each dated November 1, 1894, and payable on or before one year from the date thereof, and each bearing interest from date at the rate of ten per cent per annum. On the same day A. J. Daggs, plaintiff in error, executed a mortgage to the defendant in error upon real estate in said county to secure the said promissory notes, and on the same date executed another mortgage upon other real estate in said county to secure the same indebtedness. Separate suits were brought by the defendant in error on the 21st of February, 1896, to foreclose the three mortgages, which suits were subsequently, by order of the court, consolidated and tried as one. The answer of A. J. Daggs was the same in each of the suits, and set up a number of defenses. The first set up that the notes sued upon were usurious, in that the rate of interest charged was in excess of that allowed to be charged by a national bank in this territory under the provisions of sections 5197 and 5198 of the Revised Statutes of the United States, and for that reason the defendant in error had forfeited its right to collect any interest upon said notes. By way of counterclaim the answer set up that the defendant in error was indebted to plaintiff in error A. J. Daggs upon a certain promissory note, which reads as follows: “\$5,000.00. No. 1,340. Due Sept. 1. Phoenix, Arizona, July 1, 1893. On the 1st day of September, 1893, without grace, we, or either of us, for value received, promise to pay to Thomas Arm-

strong, Jr., at the Phoenix National Bank, at their office in Phoenix, Arizona, five thousand dollars (\$5,000) in United States gold coin, with interest at the rate of $1\frac{1}{4}$ per cent per month from — until paid. In case of legal proceedings hereon, we or either of us agree to pay ten per cent of amount found due hereon as attorney's fees. Secured by chattel mortgage of even date herewith. W. A. and P. P. Daggs. W. A. Daggs. P. P. Daggs." And indorsed on the back as follows: "Thomas Armstrong, Jr. Sept. 30, 1893, interest from July 1st to Octo. 1st, 1893, \$187.50; Dec. 30, 1893, interest from Oct. 1st, 1893, to Jan. 1st, 1894, \$187.50; April, 1894, interest from Jan'y 1st to Apr. 1st, \$187.50." That the payee of said note, Thomas Armstrong, Jr., assigned the same in blank to the defendant in error; and on the twenty-eighth day of November, A. D. 1894, for a valuable consideration, in writing, the latter assigned the same to the plaintiff in error, A. J. Daggs; and that at the date of said assignment the makers of said note were, and ever since had been, and were then, notoriously insolvent; of all of which the defendant in error is charged to have had knowledge; and further, that no part of said note had been paid, and that there was then due thereon the sum of \$7,076.91; and judgment thereon was prayed for for said amount, together with the interest thereon, according to the tenor and effect of said note. For a further defense, and by way of counterclaim, the answer set up that at the time of the execution of the three promissory notes sued upon the defendant in error and plaintiff in error A. J. Daggs entered into a contract in writing, wherein the former, as a part of the consideration of the said notes, expressly stipulated that the said notes should be received in payment for all its right, title, and interest in and to a certain chose in action wherein Hugh McCrum was plaintiff and W. A. and P. P. Daggs were defendants, and defendant in error was the intervener, which chose in action was based upon the note for five thousand dollars signed by said W. A. and P. P. Daggs, and which was set up and contained in the aforesaid counterclaim, and which was secured by a chattel mortgage executed by the payee named in said note; that the makers of said note were at the time, had been, and were then, actually and notoriously insolvent, all of which the defendant in error well knew; and that it was further

agreed between the defendant in error and the plaintiff in error A. J. Daggs that the litigation and suit upon said note and mortgage should be carried on in the name of defendant in error until the said cause should be determined and settled, and that defendant in error should pay all costs of said litigation accruing prior to November 1, 1894; that A. J. Daggs, plaintiff in error, should bear all the costs accruing thereafter; that the said plaintiff in error had paid out and expended large sums of money in the prosecution of said suit—to wit, \$45.65—as costs in and about said suit, which had accrued prior to said November 1, 1894. Said plaintiff in error further alleged that the defendant in error had wholly failed and refused to allow its name to be used in the continuation of said suit, and had wholly failed and refused to sign an appeal-bond to the supreme court of the United States as principal, in violation of its said agreement, to defendant's damage in the sum of \$10,122.55. As a further defense, the answer set up that as security to the said promissory note sued upon plaintiff in error A. J. Daggs had pledged certain shares of water stock of the reasonable value of four thousand dollars; that the defendant in error had failed and refused to account to said plaintiff in error for said certificates of water stock or their value, and had converted the same to its own use, to his damage in the sum of four thousand dollars. The answer filed by R. E. Daggs in the suit to foreclose the mortgage executed by him was substantially and in effect the same as that filed by his co-defendant, A. J. Daggs. Both the answers—that filed by A. J. Daggs and that filed by R. E. Daggs—were verified. To these answers and counterclaims therein set up defendant in error, by way of reply, filed a general denial, which was not verified. Judgment was had for the defendant in error against plaintiff in error A. J. Daggs for the amount due upon said promissory notes, and a decree entered foreclosing the mortgage given to secure the same.

At the outset we are compelled to call attention to the omission of counsel to comply with the statute and the rules of this court on the subject of assignments of error. These are imperative, and must be observed. It is not our business to search the record if perchance we may find reversible error. It is our duty to examine into such alleged errors, and only

such, as are distinctly pointed out in the record. The assignments made by plaintiffs in error in their brief are for the most part so general in character and so wanting in definiteness that they cannot be considered. Although defective as assignments, we have by liberal construction found that two of them present questions for our review. The first of these reads as follows: "The court erred in not giving judgment for plaintiffs in error on their pleas in bar of the recovery of any interest, for the reason that the contract with the national bank for ten per cent interest is *ultra vires*." What is possibly meant by this assignment is, that the court erred in allowing under the pleadings defendant in error to recover interest upon the notes sued upon, for the reason that a national bank of this territory is prohibited from charging a rate of interest in excess of seven per cent per annum, under the limitations imposed by sections 5197 and 5198 of the Revised Statutes of the United States. The pleadings present this question, and we will therefore consider it as properly assigned.

The sections of the Revised Statutes of the United States above referred to read as follows:—

"Sec. 5197. Any association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at the rate allowed by the laws of the state, territory, or district where the bank is located, and no more, except that where by the laws of any state a different rate is limited for banks of issue organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such state under this title. When no rate is fixed by the laws of the state or territory or district, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. And the purchase, discount, or sale of a *bona fide* bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts, in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

"Sec. 5198. The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding sec-

tion, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred. That suits, actions, and proceedings against any association under this title may be had in any circuit, district, or territorial court of the United States, held within the district in which such association may be established, or in any state, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases."

By the terms expressed in section 5197 it will be seen that the rate of interest which a national bank may charge is regulated by the provisions of the statutes of the state or territory where the bank is located, upon the general subject of interest. Plaintiffs in error contend that no rate of interest is fixed by the laws of this territory, and that therefore the provision of section 5197 which reads, "When no rate is fixed by the laws of the state or territory or district, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum," limits and restricts the right of a national bank in Arizona to the rate therein provided. The law upon the general subject of interest in this territory is found in paragraphs 2161 and 2162 of the Revised Statutes of 1887, which read as follows:—

"2161 (section 1). When there is no express agreement fixing a different rate of interest, interest shall be allowed at the rate of seven per cent per annum on all moneys after they become due on any bond, bill, promissory note or other instrument in writing, or any judgment recovered in any court in this territory, for money lent, for money due on any settlement of accounts from the day on which the balance is ascertained and for money received for the use of another.

"2162 (sec. 2). Parties may agree in writing for the payment of any rate of interest whatever on money due or to become due on any contract; any judgment rendered on such

contract shall conform thereto, and shall bear the rate of interest agreed upon by the parties, and which shall be specified in the judgment."

The territorial law in effect fixes the rate of interest, in the absence of any express agreement upon the subject, but permits the parties to any contract to agree in writing upon any rate whatever. The question presented therefore is, Are national banks located in states or territories having a statute upon the subject of interest which fixes a rate in the absence of an express agreement, but which likewise permits parties to stipulate in writing for any rate of interest, authorized to contract like other citizens living in such states or territories? So far as we have been able to find, there are no federal cases which conclusively adjudicate this question. In the case of *Bank v. Johnson*, 104 U. S. 271, it was decided that in the state of New York, where the state law fixed the maximum rate of interest at seven per cent, and which made any contract usurious which exceeded that rate, a national bank could not discount paper at a greater rate than seven per cent, and thus in effect reserve a greater rate of interest than that allowed by the local law. In the case of *Tiffany v. Bank*, 18 Wall. 409, the supreme court held that in the state of Missouri, where by the local law banks of issue organized under the state laws were limited to eight per cent, but the rate of interest allowed generally was ten per cent, a national bank could charge and recover interest at the higher rate allowed to natural persons. The case of *Danforth v. Bank*, 1 C. C. A. 62, 48 Fed. 271, was decided upon the statute of New Jersey fixing the legal rate of interest in that state at six per cent per annum. It was there held, following *Bank v. Johnson*, *supra*, that the purchase by a national bank of accepted drafts at a greater discount than lawful interest on their face value came within the prohibition of section 5197, and was the taking of an unlawful rate of interest under the state law. Since there are no conclusive adjudications upon the precise question under consideration in the federal courts, we must look to the decisions of the various states and territories having statutes on the subject of interest similar in their provisions to that of Arizona.

The statutes of the state of California provide that, "Unless there is an express contract in writing, fixing a different rate,

interest is payable on all moneys at the rate of seven per cent per annum." Civ. Code, sec. 1917. Construing section 5197 of the Revised Statutes of the United States in the light of the local law, the supreme court of that state in the case of *Hinds v. Marmolejo*, 60 Cal. 229, speaking by Ross, J., held that national banks, like natural persons, might charge and collect such rates of interest as might be agreed upon. The learned judge writing the opinion uses this language: "By the first clause of this section, national banks are authorized to charge and receive interest at the rate allowed by the laws of the state or territory where the bank is located, and by the last clause, when no rate is fixed by the laws of the state or territory, they are allowed a rate not exceeding seven per centum. Reading the entire section, and considering the two clauses together, as they must be considered, we are of the opinion that the word 'fixed' used in the last clause is used in the same sense as the word 'allowed' in the first clause, and that by the words 'the laws of the state or territory' is meant statute laws. In other words, that the true interpretation of the act of Congress is that, in those states and territories having no statute upon the subject of interest, the national banks are allowed a rate not exceeding seven per centum, while, in those states and territories having a statute on the subject they are authorized to charge and receive interest at the rate allowed other banks and individuals."

In the case of *Rockwell v. Bank*, 4 Colo. App. 562, 36 Pac. 905, the Colorado court of appeals held that the law of the state fixing a legal rate of interest, but permitting the parties to agree for any rate of interest, a national bank in that state may charge interest at any agreed rate. To the same effect is the case of *Bank v. Bruhn*, 64 Tex. 571, 53 Am. Rep. 771.

In the case of *Guild v. Bank*, 4 S. Dak. 566, 57 N. W. 499, the supreme court of South Dakota construed the term "fixed" as used in the clause of section 5197 which reads, "Where no rate is fixed by the laws of the state, territory, or district," etc.,—as substantially a repetition of the word "allowed," used in the first clause of the section, and held that a national bank might therefore charge any rate of interest allowed by the local statute to be the subject of contract by natural persons. The Dakota court approves the view taken upon this subject by the supreme court of California in *Hinds v. Marmolejo*,

supra. In accord with the courts of the states of California, Colorado, Texas, and North Dakota, we have reached the conclusion that a national bank in Arizona is privileged to charge and collect any rate of interest which may be agreed upon, and is as free to act in this regard as are banks organized under local laws or as individuals living in the territory.

The second assignment of error, as made by plaintiffs in error, reads: "The court erred in overruling the plaintiffs' in error motion for judgment on the pleadings, for the reason that there was no reply to plaintiffs' in error verified counterclaims." The latter part of this assignment would appear to indicate that what is intended is, that the court erred in not rendering judgment for the plaintiffs in error for the amounts of the counterclaims pleaded, because they were not denied under oath by the defendant in error in its reply to the amended answers filed by plaintiffs in error. The general denial made by the defendant in error by way of reply to the counterclaims set up in the answers of the plaintiffs in error was sufficient, although not verified, to put the plaintiffs in error upon proof, except as to any matter pleaded therein which by paragraph 735 of the Revised Statutes is required to be denied under oath. An examination of the matters pleaded by way of counterclaim in the answers of plaintiffs in error discloses that none of those are matters which are required to be verified by said paragraph, except the allegation contained in the first counterclaim attempted to be set up, founded upon the assignment of the note by P. P. and W. A. Daggs to A. J. Daggs. It is alleged that the note was assigned by the bank to Daggs by an instrument in writing. As to this allegation, possibly, under subdivision 5 of said paragraph 735, under the general denial, unverified by the oath of the defendant in error, the assignment should properly be taken as admitted. To warrant a recovery, however, something more than the proof of the assignment of the note to Daggs was needed. While our statutes recognize the right of an assignee to hold the indorser of a non-negotiable chose in action as surety for the payment of the same, no recovery is authorized without it be shown that the assignee had used due diligence to collect the same. Rev. Stats., pars. 123, 124.

Again, an examination of this pleading shows that it fails to state a cause of action. A counterclaim must, to be good,

contain every allegation which would be needed in a complaint founded on the same cause of action. The only allegations which are made in this counterclaim are, that the bank assigned a non-negotiable promissory note, past due, to A. J. Daggs, and that at the time of the assignment the makers were insolvent, and were still insolvent, and that the same had not been paid. No allegation is made that due diligence was used, as required by the statute, or that any effort was made to collect the same. This omission in the pleadings is doubly fatal for the reason that the note appears from an indorsement upon its face to have been secured by chattel mortgage of even date therewith. With this indorsement thereon, the mere allegation of the insolvency of the makers of the note was not sufficient to charge the indorser as a surety without an allegation of the exercise of due diligence to collect the same and to enforce the security, and a failure after such effort to collect the same. The motion for judgment upon this counterclaim was not only properly denied by the court below, but, had no reply been filed by the defendant in error, the facts pleaded were not sufficient to support a judgment thereon. The judgment of the lower court is affirmed.

Street, C. J., Doan, J., and Davis, J., concur.

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ATTACHMENT (Continued).

authority and right by which the plaintiff seeks to subject the property levied on to his execution, and the nature of the claim of the defendant thereto." Where both plaintiff in attachment and claimant appeared and, under direction of the court, the plaintiff filed a complaint in compliance with the statute, *supra*, and the court and both parties treated such complaint and the affidavit filed by claimant and returned by sheriff as sufficiently raising an issue, and thereupon the case was set for trial, the affidavit and bond filed by defendant was a sufficient appearance, in conjunction with the conduct of the court and parties, to prevent a judgment by default until defendant had been ordered to present some other issue, and had, after a sufficient time to comply with such order, failed so to do, and, under the circumstances, it was error for the trial court to deny defendant's motion, made before judgment rendered, for leave to file an answer, and enter judgment by default against defendant. (Lawler v. Bashford-Burmister Co., 94.)

2. SAME—SAME—JUDGMENT BY DEFAULT—MOTION TO SET ASIDE—LEAVE TO ANSWER.—Where, immediately after judgment was pronounced, defendant files his petition, supported by affidavit, praying for an order setting aside the judgment, and for leave to file an answer, tendering therewith the answer containing allegations showing a meritorious defense, it is error for the court to refuse to set aside the judgment and allow the defendant to plead. (Lawler v. Bashford-Burmister Co., 94.)
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6. ~~SAME—SAME—SAME~~—**TAKING POSSESSION—TRESPASSER.**—A sheriff becomes a trespasser by taking property under a writ of attachment from a mortgagee in possession under a valid mortgage. (*Farmers and Merchants' Bank v. Orme*, 304.)

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 3. BONDS—FUNDING ACT—ACT CONGRESS JUNE 6, 1896, SEC. 1, BEING 29 STATS. 262, CONSTRUED—JANUARY 1, 1897, NOT LIMIT UPON SALE.—The act of Congress, *supra*, approved June 6, 1896, authorizing the funding of all outstanding obligations of the territory of Arizona, and the counties, municipalities, and school districts thereof, until January 1, 1897, authorizes the funding of all obligations which existed and were outstanding prior to January 1, 1897. Said date is not a limitation upon the sale and disposition of bonds for funding purposes. (*Gage v. McCord*, 227.)
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2. **SAME—SAME—CONTRACT—CONSTRUCTION.**—A contract authorizing a real estate agent to negotiate for the sale of property "and to receipt for a deposit on such sale, . . . the price to be \$5,000 or such lower figure as you may agree to accept," is not to be construed as requiring a sale for cash alone. (*Czarnowski v. Holland*, 119.)
3. **BROKERS—REAL ESTATE AGENT—ACTION FOR COMMISSION—EVIDENCE—QUANTUM MERUIT—NECESSITY FOR WRITTEN CONTRACT.**—In an action by a real estate agent for commission, it is error to exclude evidence of a written contract for such commission though the trial court offered to allow the plaintiff to prove the value of his services in selling the lots in question. To entitle the broker to recover commissions for effecting a sale of real estate, it is indispensable that he should show that he was employed by the owner to make the sale, and this employment must be in writing. (*Czarnowski v. Holland*, 119.)

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CHOSSES IN ACTION (Continued).

out it be shown that the assignee has used due diligence to collect the same. Statute, *supra*, cited. (*Daggs v. Phoenix National Bank*, 409.)

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2. **SAME—TRIAL—JURY—ASSESSING VALUE—REV. STATS. ARIZ. 1887, PAR. 202, CONSTRUED.**—Where the value of the property is an issue in the trial of an action of claim and delivery before a jury it is error for the court to assess the value. That is for the jury. Statutes, *supra*, construed. (*Levy v. Leatherwood*, 244.)
3. **SAME—JUDGMENT—SPECIAL INTEREST—SHERIFF—VALUE OF INTEREST—EVIDENCE.**—Where in an action of claim and delivery the answer of defendant sets up a special interest as sheriff, by virtue of levies under writs of attachment, the court can only assess the value of such special interest as shown by the amounts as claimed in such writs, with costs; or in case judgments had been rendered in such attachment suits, then for the amount of the judgments and interest. (*Levy v. Leatherwood*, 244.)
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CONSIDERATION. See Contract, 1; Real Property, 4.

CONSTITUTIONAL LAW.

1. CONSTITUTIONAL LAW—COUNTIES—REWARDS—LIMIT UPON INDEBTEDNESS—LAWS OF ARIZ. 1889, ACT NO. 18, APPROVED MARCH 19, 1889—HARRISON ACT, 1ST SUPP. REV. STATS. U. S., P. 503, SECS. 4, 7 (ORGANIC LAW ARIZ., REV. STATS. 1901, PAR. 63)—VALIDITY.—Act No. 18, *supra*, provides that the boards of supervisors of the various counties are required to offer a reward of not to exceed three thousand dollars to any person or persons who shall be first in obtaining an artesian well in the county, conforming to the specifications of the act; that after completion of the well, upon notice to the board, the board shall examine the well, and if satisfied that the requirements of the act have been met, shall draw a warrant on the treasurer for the amount of the reward; that all expenses incurred shall be a charge against the county. The fourth section of the Harrison Act, *supra*, provides that no county in any territory shall ever become indebted in any manner or for any purpose to any amount in the aggregate, including existing indebtedness, exceeding four per cent of the value of the taxable property within such county; and all bonds or obligations in excess of such amount given by such corporation shall be void, etc. Section 7 of the Harrison Act is as follows: "That all acts and parts of acts hereafter passed by any territorial legislature in conflict with the provisions of this act shall be null and void." No judgment can be rendered for plaintiff in an action upon an account presented by plaintiff against the county of Cochise for a reward offered under the provisions of act No. 18, *supra*, the act being void, as creating an obligation prohibited by the Harrison Act, *supra*, it appearing from the record that the county of Cochise was indebted in an amount in excess of four per cent on all the taxable property in the county. (*McRae v. County of Cochise*, 26.)
2. CONSTITUTIONAL LAW—REV. STATS. U. S., SEC. 1851, ORGANIC LAW ARIZ., REV. STATS. ARIZ. 1901, PAR. 15—"RIGHTFUL SUBJECT OF LEGISLATION" CONSTRUED—PUBLIC USE—LAWS ARIZ. 1889, ACT NO. 18, APPROVED MARCH 19, 1889—VALIDITY.—Section 1851, *supra*, provides: "The legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States." The phrase "rightful sub-

CONSTITUTIONAL LAW (Continued).

ject of legislation," used in said act of Congress, must be construed to mean the same thing as the phrase "public use." Act No. 18, *supra*, not being a law for a public use, is void. (*McRae v. County of Cochise*, 26.)

3. SAME—HARRISON ACT, 1ST SUPP. REV. STATS. U. S., P. 503, SEC. 1, BEING PAR. 63 ORGANIC LAW, REV. STATS. 1901—COUNTIES—REWARDS—LAWS ARIZ. 1889, ACT NO. 18, APPROVED MARCH 19, 1889—SPECIAL LAW—VALIDITY.—Section one of the Harrison Act, *supra*, contains the following: "That the legislature of the territories of the United States . . . shall not pass local or special laws in any of the following enumerated cases; that is to say: . . . Granting to any corporation, association, or individual any . . . privilege, immunity, or franchise whatever. . . ." Act No. 18, *supra*, providing for the payment of a reward by the county to the first one obtaining a flowing well, is void as a special act in conflict with section 1 of the Harrison Act. (*McRae v. County of Cochise*, 26.)
4. CONSTITUTIONAL LAW—TAXES AND TAXATION—REVENUE ACT, REV. STATS. ARIZ. 1887, TIT. 56, VALID—HARRISON ACT, 1ST SUPP. REV. STATS. U. S., P. 503—SPECIAL LEGISLATION REGULATING PRACTICE IN COURTS OF JUSTICE.—The revenue law of the territory providing that judgment may be entered in the district court for delinquent taxes, without the service of summons or notice thereof upon the owners of property on which the taxes are delinquent other than by publication, is valid and not in conflict with the provision of the Harrison Act, *supra*, providing that the territorial legislature shall pass no local or special act regulating the practice in courts of justice. (*Hughes v. Lazard*, 4.)
5. SAME—SAME—COURTS—SPECIAL PROCEDURE TO COLLECT TAXES.—The territory, through its legislature, can avail itself of the judicial power as the means by which it will collect the taxes; and in such proceedings it may prescribe such procedure as may best avail for that purpose, irrespective of the mode of procedure provided for the determination of controversies between individuals. (*Hughes v. Lazard*, 4.)

CONSTRUCTION.

Of contract. See Brokers, 2.

See Contracts, 2, 3; Joint-Stock Company, 3; Pleading, 15.

CONSTRUCTIVE NOTICE. See Executions, 2.

CONTEST. See Elections, 1, 2, 3, 4, 5, 6, 7, 8.

CONTRACTS.

1. CONTRACT—CONSIDERATION—PROMISE TO DELIVER NOTE HELD AS COLLATERAL.—Where at the time of the assignment of a note from

CONTRACTS (Continued).

Nellis to Boyce the bank held the same as collateral security for an existing indebtedness from Nellis to it, a promise made by its cashier to Boyce to deliver up the note, being without consideration, is not enforceable by Royce. (*McCormack v. Arizona Central Bank*, 278.)

2. **CONTRACTS—CONSTRUCTION.**—Where a contract admits of two constructions, one of which nullifies the contract and the other upholds it, the former must be discarded and the latter adopted where it appears that the contract is reasonable and effects no injury to either party. (*Czarnowski v. Holland*, 119.)

3. **SAME—SAME—IMPLICATIONS—CONFORMITY TO USAGE.**—Stipulations which are necessary to make a contract reasonable and conformable to usage are implied with respect to matters concerning which the contract manifests no contrary intention. (*Czarnowski v. Holland*, 119.)

In writing necessary where agent sues to recover commission for sale of land. See *Brokers*, 3.

See *Bond*, 1, 2; *Brokers*, 2; *Joint-Stock Company*, 2, 3; *Pleading*, 2, 8.

CONVERSION. See *Offices and Officers*, 11, 13.

CONVEYANCES.

1. **CONVEYANCES—INNOCENT PURCHASERS—EVIDENCE—STATE OF RECORD TITLE.**—Where an indorser of a sheriff's certificate of sale quitsclaims his interest in the property conveyed thereby, and the grantee testifies positively that nothing was said in the negotiations for the deed that gave him an intimation that the same interest had been theretofore conveyed to plaintiff by the indorsee by an unrecorded deed, he will be held to be an innocent purchaser for value, the indorsee's recollection being at fault as to what was said upon that subject at the time of the transaction, and it appearing that no sheriff's deed had been made, though the time for redemption had long since expired. (*Webber v. Kastner*, 324.)

CORAM NOBIS.

Writ of error, obsolete. See *Practice*, 1.

CORPORATION.

Right to hold public lands. See *Public Lands*, 5.

COUNTERCLAIM. See *Pleading*, 3, 4, 5, 6.

COUNTIES.

1. **COUNTIES—DIVISION OF—INDEBTEDNESS—ACT OF FEBRUARY 19, 1891, AND ACT OF MARCH 12, 1885, CITED—BONDS—IN AID OF PRESCOTT**

COUNTIES (Continued).

AND ARIZONA RAILWAY COMPANY, ISSUED BY YAVAPAI COUNTY, VALID BY ACT OF CONGRESS APPROVED JUNE 6, 1896.—The act of February 19, 1891, *supra*, created the county of Coconino out of the county of Yavapai, and provided that one third of the indebtedness of the latter should be assumed and paid by the former by means of bonds, which the county of Yavapai was authorized to accept and dispose of for its own benefit. A portion of the indebtedness assumed by the county of Coconino, and for which bonds were issued, was on account of bonds issued by Yavapai County in aid of the Prescott and Arizona Railway Company, under act of March 12, 1885, *supra*. In an action brought by Coconino County to recover the amount paid on account of such railway aid bonds, a demurrer to the complaint was properly sustained, said railway aid bonds having been validated by the act of Congress approved June 6, 1896, *supra*. (Coconino County v. Yavapai County, 385.)

2. SAME—SAME—SAME—PLEADING—SUFFICIENCY OF COMPLAINT.—In an action by the county of Coconino against the county of Yavapai to recover a portion of indebtedness assumed under the County Division Act, represented by railway aid bonds alleged to be void, a demurrer to the complaint is properly sustained, it alleging that many of the bonds, covering the amount sought to be recovered, executed and delivered by Coconino County to Yavapai County, had been sold and delivered to sundry persons, and the remainder funded under the Territorial Funding Act before the suit was brought, and failing to show that said railway aid bonds were not still an outstanding and a subsisting indebtedness against Yavapai County. Said Coconino County being a portion of Yavapai County at the time the bonds were issued, must be held to bear its portion of the burden. (Coconino County v. Yavapai County, 385.)

See Constitutional Law, 1.

COUNTY.

Fraudulent claims against. See Criminal Law, 13.

COUNTY TREASURER. See Offices and Officers, 3.

COURT COMMISSIONERS. See Offices and Officers, 4.

COURTS.

1. COURTS—JURISDICTION—CHANGE OF VENUE—CALLING IN JUDGE TO TRY CASE—POWER TO CALL IN SECOND JUDGE—LAWS 1891, ACT NO. 40, SECS. 1, 2, CONSTRUED.—The presiding judge of the district does not lose jurisdiction of a case by entering an order, upon a motion for change of venue based upon an affidavit of bias and prejudice granting the motion, and in accordance with section 2 of act No. 40, *supra*, calling in another judge, who has consented to hear the cause at the original place of trial, so as to prevent him, upon inability of such judge to try the case on account of illness,

COURTS (Continued).

to reassign the case to a third judge, consenting to try the same at said place. (*Daggs v. Hoskins*, 300.)

2. COURTS—JURISDICTION—JUDGMENTS—APPEAL—POWER TO ALTER AFTER APPEAL DURING TERM.—A district court has power, after notice of appeal has been given and bond on appeal filed, at any time during the term at which a judgment has been entered, to set aside such judgment and enter such other judgment as is warranted by the law and the evidence. (*Sullivan v. Woods*, 196.)

See Constitutional Law, 4, 5.

COVENANT.

For quiet possession. See Landlord and Tenant, 1.

COW. See Criminal Law, 14.

CREDIT.

One to whom given, principal. See Negotiable Instruments, 3.

CREDITOR'S BILL. See Fraudulent Conveyances, 1.

CRIMINAL LAW.

1. CRIMINAL LAW—AGGRAVATED ASSAULT—PRIEST'S RIGHT TO PUNISH CHILD—REQUEST OF PARENTS.—A patriarch or priest, simply because he is such, cannot whip a child capable of appreciating correction, at the request of parents. (*Donnelley v. Territory of Arizona*, 291.)
2. SAME—SAME—PUNISHMENT OF CHILD—EVIDENCE—REQUEST OF PARENTS—MITIGATION.—Under an indictment for aggravated assault, the intent with which the act was committed being an element of the crime, it was error for the trial court to exclude evidence that the punishment of the child was at the request of parents, as it was proper for the jury to consider such evidence in determining whether defendant was guilty of simple or aggravated assault. (*Donnelley v. Territory of Arizona*, 291.)
3. SAME—SAME—WITNESSES—CHILD—QUALIFICATION—KNOWLEDGE OF NATURE OF OATH—CHARACTER OF TESTIMONY.—It is error for the trial court to permit a child six years and eleven months old, upon whom it is alleged defendant made an assault, to testify, where it appears that he has little knowledge of the nature of an oath or the consequence of falsehood, except that he answered that people who told a lie would go to jail, especially where his story corroborates strongly his mother's, under whose instruction as to being a witness it is admitted he has been. (*Donnelley v. Territory of Arizona*, 291.)
4. CRIMINAL LAW—ALIBI—BURDEN OF PROOF.—The burden of proof is not on the defendant in a criminal prosecution to prove an *alibi*, and if, by reason of the evidence in relation to such *alibi*, the jury

CRIMINAL LAW (Continued).

should doubt defendant's guilt, he would be entitled to an acquittal, although the jury might not be able to say the *alibi* had been fully proved. (*Schultz v. Territory of Arizona*, 239.)

5. CRIMINAL LAW—APPEAL AND ERROR—LAWS 1897, ACT NO. 71, DOES NOT APPLY TO APPEALS IN CRIMINAL CASES.—Act No. 71, *supra*, "relating to appeals and writs of error from the district and circuit courts of the territory of Arizona to the supreme court," has no relation to appeals in criminal cases. (*Parker v. Territory of Arizona*, 283.)
6. SAME—SAME—SAME—PRACTICE — CHANGE IN — MURDER — REVIEW UPON IMPERFECT RECORD—REV. STATS. ARIZ. 1887, PENAL CODE, PAR. 1880, CITED.—An appeal in a criminal case being erroneously taken under act No. 71, *supra*, this being the first session of the supreme court after the passage of the act, and paragraph 1880, *supra*, providing that the appellate court in criminal cases shall look into the record, and that the appeal shall not be dismissed if sufficient matter be contained in the record to enable the court to decide the cause on its merits, this court will not dismiss the appeal, or examine only into the indictment and judgment, where the charge is murder. (*Parker v. Territory of Arizona*, 283.)
7. SAME—GRAND JURY—CHARGE.—A charge to the grand jury, calling their attention to a recent jail-breaking in which a citizen had lost his life, and asking that they investigate all of the circumstances pertaining thereto, and to make an early report, but containing no reference to the defendant, subsequently indicted by such grand jury for the murder of the citizen, is not error. (*Parker v. Territory of Arizona*, 283.)
8. SAME—TRIAL—SHACKLING PRISONER—HARMLESS ERROR.—The shackling of a lawless, desperate character upon his first arraignment for murder is not reversible error where the record shows that the arraignment was set aside and fails to show that he was so shackled at the second arraignment or at any subsequent time during the trial. (*Parker v. Territory of Arizona*, 283.)
9. SAME—INDICTMENT—SETTING ASIDE—APPEAL AND ERROR—RECORD—INSUFFICIENCY—REV. STATS. ARIZ. 1887, PENAL CODE, PAR. 1513, 1387, CONSTRUED.—Paragraph 1513, *supra*, provides: "The indictment must be set aside by the court in which the defendant is arraigned upon his motion in either of the following cases: . . . (4) When the defendant had not been held to answer before the finding of the indictment on any ground which had been good ground for challenge, either to the panel or to any individual juror [grand juror]." Paragraph 1387, *supra*, provides: "A challenge to an individual grand juror may be interposed if a state of mind exists upon his part in reference to the case or to either party which satisfies the court, in the exercise of a sound discretion, that he can-

CRIMINAL LAW (Continued).

not act impartially and without prejudice to the substantial rights of the party challenging." This right can only be exercised, after the indictment, by the defendant, when he had not been held to answer before the impaneling of the grand jury, and was not present at the impaneling. Where the record shows that defendant was present at the impaneling of the grand jury, and does not show that he was not then charged with the crime of murder, he cannot complain of the overruling of his motion to set aside the indictment. (*Parker v. Territory of Arizona*, 283.)

10. SAME—SAME—SAME—MOTION—MUST BE SUPPORTED BY AFFIDAVITS OR RECORD.—Motions to set aside an indictment, unsupported by affidavit, and not showing the nature or character of the evidence upon which they are based, are insufficient. They must be based upon some facts appearing from the record or otherwise produced before the court. (*Parker v. Territory of Arizona*, 283.)
11. SAME—CHANGE OF VENUE—PREJUDICE—SHOWING—TERRITORY V. BARTH, 2 ARIZ. 319, FOLLOWED.—It is not error for the trial court to refuse a motion for a change of venue supported by the affidavits of defendant, his co-defendants, and five others, including his two counsel, tending to show a prejudice in the county which would preclude a fair trial, where the same was met by affidavits of eighty-four citizens, including nineteen grand jurors, who found the indictment, denying the existence of such prejudice. *Territory v. Barth*, *supra*, followed. (*Parker v. Territory of Arizona*, 283.)
12. SAME—MURDER—INSTRUCTIONS—PREMEDITATION AND DELIBERATION—EVIDENCE.—Where the evidence showed that defendant and others broke jail, and in the scuffle the jailer made an outcry, and one Lee Norris came to his assistance, but, on seeing defendant armed with a shot-gun, turned to flee, when defendant shot him in the back, it is not error for the court to refuse to instruct the jury that, under the evidence in the case, no deliberation or premeditation relating to the killing of Lee Norris has been proven by the prosecution, and therefore the defendant cannot lawfully be found guilty of murder in the first degree. It was the duty of the court, under proper instructions, to submit to the jury the question of premeditation and deliberation. (*Parker v. Territory of Arizona*, 283.)
13. CRIMINAL LAW—FRAUDULENT CLAIMS AGAINST COUNTY—INDICTMENT—SUFFICIENCY—REV. STATS. ARIZ. 1887, PENAL CODE, PAR. 105, AND CIVIL CODE, PAR. 1574, CITED AND CONSTRUED.—An indictment under paragraph 105, *supra*, which provides that every person who, with intent to defraud, presents for payment to any territorial or county officer authorized to pay the same, if genuine, any false or fraudulent claim is guilty of a felony, fails to state facts sufficient to constitute a public offense, where it charges that the defendant Cluff presented a fraudulent school-warrant drawn in favor of Wild, or order, to the county treasurer for payment, he being authorized

CRIMINAL LAW (Continued).

to pay the same if genuine, but fails to allege that it was indorsed by Wild to defendant, or that it contained any indorsement whatever when presented for payment, as by express provision of paragraph 1574, *supra*, the treasurer was only permitted to pay the money on such warrant when "duly indorsed by the person entitled to receive the same." (*Cluff v. Territory of Arizona*, 255.)

14. CRIMINAL LAW—INDICTMENT—MATERIAL ALLEGATION—STEER—PROOF—COW—VARIANCE—REV. STATS. ARIZ. 1887, PEN. CODE, PAR. 765, CITED.—In an indictment under the statute, *supra*, making the felonious taking of a cow, steer, etc., grand larceny, charging defendant with the larceny of a steer, the allegation that the animal stolen was a steer is a material allegation, and must be proved as charged. Proof that the animal stolen was a cow is a fatal variance. (*Martinez v. Territory of Arizona*, 55.)
15. CRIMINAL LAW—LIBEL—REV. STATS. ARIZ. 1887, PENAL CODE, PARS. 405, 1818, 1833, CITED AND CONSTRUED—JUDGMENT—IMPRISONMENT TILL PAYMENT OF FINE—VOID—ILLEGAL IMPRISONMENT—NEW TRIAL—DISMISSAL.—Paragraph 405, *supra*, provides: "Every person who willfully, and with a malicious intent to injure another, publishes or procures to be published any libel, is punishable by a fine not exceeding five thousand dollars or imprisonment in the territorial prison not exceeding one year." Paragraph 1833, *supra*, provides that if the judgment be a fine, the fine can be collected by an execution issued upon such judgment, as on a judgment in a civil case. Paragraph 1818, *supra*, provides: "A judgment that the defendant pay a fine, may also direct that he be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which must not exceed one day for every dollar of the fine." Under the statutes a judgment upon conviction for criminal libel that the defendant "be fined in the sum of one thousand dollars, and that he be delivered or remanded to the custody of the sheriff of the county of Pima, territory of Arizona, until said fine is paid," is void, and it appearing that defendant under said judgment has been compelled to perform a part of said illegal judgment, he cannot be tried again, and the case will be dismissed. (*Dunbar v. Territory of Arizona*, 184.)
16. CRIMINAL LAW—MURDER—EVIDENCE—DYING DECLARATIONS—FOUNDATION—SUFFICIENCY.—Testimony that decedent passed witness's house, one hundred and fifty feet from decedent's home, five or ten minutes before witness heard shots in that direction, and that immediately witness opened the door and heard decedent at witness's gate calling him; that decedent came to witness's house and sank down on the ground apparently badly wounded; that witness assisted decedent to lie down and called for help; that decedent exclaimed at the time, "I am shot through and through," "I am full of blood and can't live ten minutes"; that decedent then made a statement as to how the shooting occurred, and immediately afterwards became unconscious and so remained until he died, an hour

CRIMINAL LAW (Continued).

and a half later, coupled with other testimony showing that defendant and decedent's wife were at decedent's home, occupying suspicious relations, at the time he entered, is sufficient foundation for the introduction of such dying declarations. (*Wagoner v. Territory of Arizona*, 175.)

17. ~~SAME—SAME—SAME—SAME—SAME—MUST BE MADE UNDER SENSE OF IMPENDING DEATH.~~—It is essential to the admissibility of dying declarations, and is a preliminary fact, to be proven by the party offering them in evidence, that they be made under a sense of impending death; but it is not necessary that they should be stated at the time to be so made. It is enough if it satisfactorily appears in any mode that they were made under that sanction. The length of time which elapsed between the declaration and death furnishes no rule for the admission or rejection of the testimony, though it may serve as evidence as to deceased's belief that his dissolution was or was not impending. (*Wagoner v. Territory of Arizona*, 175.)

18. ~~SAME—SAME—EVIDENCE—INSTRUCTIONS—DEFENDANT TRESPASSER.~~—An instruction, based upon evidence tending to show that at the time of the shooting defendant was at deceased's house occupying suspicious relations with deceased's wife, using the expressions "a trespasser" and "a trespasser" with reference to the conduct of the defendant, and with reference to the defendant being at the house, is proper. (*Wagoner v. Territory of Arizona*, 175.)

See Appeal and Error, 9.

DAMAGES. See Bond, 1, 2; Claims and Delivery, 4; Irrigation, 1; Offices and Officers, 11, 12, 13; Pleading, 11.

DEATH OF PARTY.

Pending appeal and judgment. See Abatement, 1.

DEEDS.

Admissibility of, in evidence. See Ejectment, 3.
See Principal and Agent, 1; Real Property, 1, 4.

DEFAULT.

Premature. See Answer, 2.
Setting aside. See Answer, 2; Attachment, 1, 2, 3.
See Answer, 1, 2.

DEFENSE. See Appeal and Error, 9.

DEMURRER.

General, duty of counsel in regard to urging ground thereof. See Mines and Mining, 3.
To evidence, improper practice. See Trial, 1.
See Pleading, 7, 9, 10.

DESCENT AND DISTRIBUTION.

1. **DESCENT AND DISTRIBUTION—BASTARD—CHILD OF WHITE MAN AND INDIAN—REV. STATS. ARIZ. 1887, PAR. 1470, CONSTRUED.**—Paragraph 1470, *supra*, provides: "Where a man having by a woman a child or children, and afterwards intermarrying with such woman, such child or children, if recognized by him, shall thereby be legitimized and made capable of inheriting his estate. The issue also of marriages deemed null in law shall nevertheless be legitimate." A child of an attempted marriage of a white man and an Indian, married according to the customs of her tribe, is not legitimate under the last sentence of said statute. Both parts thereof require a marriage, and in such case there is no marriage in fact. (Estate of Walker, 70.)

DILIGENCE. See Choses in Action, 1.

DIRECTION OF VERDICT. See Evidence, 2.

DISMISSAL. See Criminal Law, 15.

DISTRICT COURT. See Appeal and Error, 7.

DIVISION OF COUNTIES. See Counties, 1, 2.

DOWER. See Real Property, 3.

DRUNKENNESS.

Voluntary, may be considered where specific intent is an essential element of a crime. See Appeal and Error, 9.

DUPLICITY. See Malicious Prosecution, 1.

DURESS. See Offices and Officers, 1.

DYING DECLARATIONS.

Foundations, sufficiency. See Criminal Law, 16, 17.

EJECTMENT.

1. **EJECTMENT—POSSESSION—EVIDENCE—SUFFICIENCY.**—In an action of ejectment, it is not error for the trial court to hold that plaintiff was in possession when defendant's own testimony shows that there was a fence around the land; that most of it was in cultivation when he went there; that there was a house on the land, agricultural crops growing, and alfalfa in the stack; that he knew plaintiff claimed the property; that the occupants told him they were keeping it for plaintiff; that there was property there belonging to plaintiff; and that he moved into plaintiff's house. (Tidwell v. Chiricahua Cattle Co., 352.)
2. **SAME—SAME—SURREPTITIOUS ENTRY IN ABSENCE OF OWNER—EQUIVALENT TO FORCIBLE ENTRY IN PRESENCE.**—A surreptitious entry during the temporary absence of the owner or tenant, against the will

EJECTMENT (Continued).

of said owner or tenant, and without his permission, is equivalent to a forcible entry against his will in his presence. (*Tidwell v. Chiricahua Cattle Co.*, 352.)

3. EJECTMENT—PUBLIC LANDS—OCCUPANT'S TITLE—EVIDENCE—DEEDS—ADMISSIBILITY—REV. STATS. ARIZ. 1887, PARS. 2222, 2223, 3135, 3138, CITED AND CONSTRUED—POSSESSORY ACTION—DEFENSES—TITLE IN UNITED STATES NO DEFENSE.—Deed from former owners and holders to plaintiff of the premises in controversy, the title to which is in the United States, are admissible in evidence as tending to show plaintiff's right to possession in an action of ejectment against a trespasser or intruder, paragraph 2222, *supra*, providing that all persons who have settled upon and cultivated land with a view to pre-empting the same shall be protected in the possession of the same, with the improvements, to the extent of one hundred and sixty acres, and paragraph 2223, *supra*, providing that all rights acquired by the above section may be sold and conveyed as interests in real estate. In accordance with these provisions, our statutes do not necessitate the showing by the plaintiff of an absolutely clear and perfect title, but provide (par. 3135, *supra*) that "the action of ejectment may be maintained in all cases where the plaintiff is legally entitled to the possession of the premises." Paragraph 3138, *supra*, which provides that "the defendant may plead not guilty, and under such plea give in evidence any testimony tending to show that the plaintiff is not entitled to such possession, or that the title is in some person other than the government," *per contra*, excludes evidence of title in the government as a defense in ejectment. (*Tidwell v. Chiricahua Cattle Co.*, 352.)
4. EJECTMENT—RIGHT TO MAINTAIN—EVIDENCE OF TRANSFER OF TITLE BY PLAINTIFF BEFORE SUIT FILED.—Where the evidence of plaintiff in an action of ejectment discloses that he had sold the property several months before suit was filed, and there is no evidence of a retransfer to or of present right of possession in plaintiff, judgment should be entered for defendant. (*Salcido v. Genung*, 23.)

See Public Lands, 5.

ELECTIONS.

1. ELECTIONS—CONTEST—EVIDENCE—RETURNS OF ELECTION BOARD—CONCLUSIVE UPON CANVASSING BOARD—PRIMA FACIE IN ELECTION CONTEST—BURDEN OF PROOF ON PERSON ASSAILING CORRECTNESS.—The returns of an election board, when legally and properly authenticated, are not only conclusive upon the board of canvassing officers, but are also *prima facie* evidence of the number of votes cast, in a proceeding to contest the election; and the burden of proof is upon the person who assails the correctness of these returns. (*Oakes v. Finlay*, 390.)

ELECTIONS (Continued).

2. SAME—SAME—SAME—BALLOTS—RECOUNT OF ORIGINAL OVERCOMES RETURNS.—Where the identical ballots cast at the election have been properly preserved so they can be recounted by the order of the court, they will govern when there is a difference between them and the returns. (Oakes v. Finlay, 390.)
3. SAME—SAME—SAME—SAME—IDENTITY MUST BE PROVEN BEFORE RECOUNT.—One who relies upon overcoming the *prima facie* correctness of the official canvass by a resort to the ballots must first show that the ballots as presented to the court are intact and genuine. (Oakes v. Finlay, 390.)
4. SAME—SAME—SAME—PAROL TESTIMONY AS TO BALLOTS—ADMISSIBILITY.—Where the ballots rejected by the election board were not before the court in the same condition as when voted, it is error to receive parol testimony as to how they were marked to reverse or disturb the returns made by the canvassing board. (Oakes v. Finlay, 390.)
5. ELECTIONS—CONTEST—OFFICIAL CANVASS—PRIMA FACIE CORRECT—MAY BE OVERCOME BY RECOUNT OF BALLOTS CAST.—In a contested election case, the *prima facie* correctness of the official canvass stands until overcome by a recount of the ballots cast. (Pusch v. Brady, 400.)
6. SAME—SAME—BALLOTS—EVIDENCE—ADMISSIBILITY.—The ballots that were cast at the election, and which have been preserved in compliance with the mode prescribed by statute, are admissible in evidence to overcome the *prima facie* correctness of the official canvass. Only those ballots which were actually voted at the election will be counted in the recount before the court for that purpose. (Pusch v. Brady, 400.)
7. SAME—SAME—SAME—REJECTED BALLOTS—MAY BE ADDED TO COUNT WHERE ENTITLED TO BE.—Ballots voted at the election which were rejected by the election board, and counted in the return as "rejected ballots," found among the ballots in the recount in the contest, are evidence of what they present; and it is competent to add to the count for the contestant any ballots determined to be so entitled. (Pusch v. Brady, 400.)
8. SAME—SAME—SAME—NOT THOSE VOTED AT ELECTION NOT ADMISSIBLE—PAROL TESTIMONY AS TO HOW VOTED NOT ADMISSIBLE.—Ballots presented in a contest, and found by the court not to be the same ballots that were voted at the election, have no controlling effect; and oral testimony as to the similarity of said ballots to those rejected, or as to how the rejected ballots were marked, or what they would show if presented, or for what candidate voted, is not admissible to authorize such ballots to be counted. (Pusch v. Brady, 400.)

See Schools, 1, 2, 3, 4.

ELECTION TO TAKE VALUE OF PROPERTY. See Appeal and Error, 4.

ENTRY.

Surreptitious. See Ejectment, 2.

ERROR. See Appeal and Error.

Where none apparent on face of record. See Appeal and Error, 2.

ESTOPPEL IN PAIS.

1. ESTOPPEL IN PAIS—PROMISE TO DO SOMETHING IN FUTURE—LOAN ON PROMISE OF THIRD PARTY TO SURRENDER BORROWED NOTE.—The fact that Boyce, in reliance upon the promise of the cashier of a bank to surrender to him a note of Nellis, held by such bank as collateral security, made advances to Nellis, cannot operate to estop the bank from enforcing its rights against such collateral, as an estoppel *in pais* cannot be based upon a mere promise to do something in the future. (McCormack v. Arizona Central Bank, 278.)

See Mines and Mining, 4, 5, 6, 8.

EVIDENCE.

1. EVIDENCE—ACCOUNT OF WAR DEPARTMENT—TREASURY TRANSCRIPT—REV. STATS. U. S., SEC. 886, CONSTRUED—UNITED STATES v. ELLIS, 2 ARIZ. 253, 14 PAC. 300, FOLLOWED.—In an action for damages brought by the United States against a party who failed to comply with his bid to furnish supplies to the war department, and the guarantors upon his bid, a United States treasury transcript, duly certified under section 886, *supra*, showing the advertisement for the bid, the proposal of the defendant, the guaranty of his co-defendants, the notice to defendant of the acceptance of his bid, the letter of defendant refusing to enter into the contract and bond required, the itemized statement and account showing that purchases by the government in consequence of the default of defendant, should be received in evidence, the suit involving an account. *United States v. Ellis*, 2 Ariz. 253, 14 Pac. 300, followed. (*United States v. Drachman*, 13.)
2. EVIDENCE—INSUFFICIENCY—DIRECTION OF VERDICT.—Where the evidence is insufficient to sustain a verdict for the plaintiff, it is error for the trial court to deny defendant's motion, made at the close of plaintiff's case, to direct the jury to return a verdict in his favor. (*Root v. Fay*, 19.)
3. EVIDENCE—JUDICIAL NOTICE—ATTORNEYS AT LAW—OFFICERS OF COURT.—Under our statute a lawyer may be an attorney and officer of the district court, and yet not be a member of the bar of the supreme court; and this court cannot take judicial notice of the officers of the district court. (*Clark v. Morrison*, 349.)

EVIDENCE (Continued).

4. **SAME—PRESUMPTIONS—RECITALS OF JUDGMENT—ATTORNEYS AT LAW.**—Where the record shows that an answer was filed below signed by attorneys for defendant, and the judgment recites that the defendant entered his appearance by filing his answer, the presumption is, that such attorneys were duly qualified and authorized attorneys of said court. (*Clark v. Morrison*, 349.)
5. **EVIDENCE—PRESUMPTIONS—MONEY IN TREASURY TO MEET INDEBTEDNESS.**—It is not to be presumed that there was money in the county treasury with which the indebtedness of a county could be discharged where the evidence discloses that the county is at the time heavily indebted. (*McRae v. County of Cochise*, 26.)
6. **EVIDENCE—UNITED STATES TREASURER'S TRANSCRIPT—REV. STATS. U. S., SEC. 886, CITED.**—The treasurer's transcript, duly certified under section 886, *supra*, was properly admitted as evidence of all things therein contained which came within the official knowledge of the accounting officers of the treasury department. (*Smith v. United States*, 57.)
7. **EVIDENCE—UNITED STATES TREASURY TRANSCRIPT—REV. STATS. U. S., SEC. 886, CONSTRUED—UNITED STATES v. ELLIS, 2 ARIZ. 253, AND UNITED STATES v. DRACHMAN, 4 ARIZ. 297, FOLLOWED.**—A transcript, duly certified as provided by section 886, *supra*, showing the transaction connected with the bid of Drachman, his failure to comply with the terms of his proposal, the subsequent purchases by the quartermaster's department of hay, and the amounts paid for the same, and containing copies of Drachman's bid, the bond sued upon, and the correspondence between the chief quartermaster and Drachman relating thereto, is properly admitted in evidence in a suit by the United States against Drachman's bondsman to recover damages for his failure to comply with his bid. *United States v. Ellis*, and *United States v. Drachman*, *supra*, followed. (*Dennis v. United States*, 313.)
8. **SAME—SAME—SAME—PRIMA FACIE CASE—SUPPLEMENTAL PROOF.**—A treasury transcript, certified under section 886, *supra*, providing, "and the court trying the cause shall be authorized to grant judgment and award execution accordingly," is not to be construed as authorizing judgment in favor of the government unless such transcript in itself makes a *prima facie* case which is not overcome by defendant's evidence. If such transcript fails to make such *prima facie* case, it must be supplemented by such competent evidence as will entitle the government to a recovery under the well-settled rules of law governing the action. (*Dennis v. United States*, 313.)

See Appeal and Error, 3, 5, 8, 9, 11, 12, 13; Bond, 1, 2; Brokers, 1, 3; Claim and Delivery, 3; Conveyances, 1; Criminal Law, 2, 3, 12, 16, 17, 18; Ejectment, 1, 2, 3; Elections, 1, 2, 3, 4, 6, 8; Fraud, 1; Fraudulent Conveyances, 1; Mechanics' Liens, 1, 3; Mines and Mining, 1; Mortgage, 1, 2; Negotiable Instruments, Arizona 5—29

EVIDENCE (Continued).

3; Offices and Officers, 11, 12, 15; Pleading, 12, 15, 18; Post-Office, 1, 2; Principal and Agent, 2; Railroads, 1; Roads and Highways, 1; Taxes and Taxation, 1, 3.

EXCESSIVE LEVY. See Attachment, 4; Pleading, 11.

EXECUTIONS.

1. EXECUTIONS—LEVY—SUFFICIENCY—RECITALS IN NOTICE AND CERTIFICATE OF SALE—INTEREST CONVEYED.—A sale to a judgment creditor of an interest in a mining claim owned by the judgment debtor is valid and sufficient to pass the title of the judgment debtor held at the time of the levy of the execution, though the sheriff in making the levy recited that he levied on the right, title, and interest owned by defendant on January 15, 1891, eight months prior to the date of the judgment and execution, it sufficiently appearing that in the notice of sale given under the levy that the sheriff had levied upon the interest which defendant had on January 15, 1891, "or now has," and in the certificate of sale that, under and by virtue of a certain execution, etc., he is required to satisfy the judgment "out of the real property belonging to the said defendant on the fifteenth day of January, 1891, or at any time thereafter," and it further reciting that he had levied on all of the interest of said defendant in said mining claim. (*Webber v. Kastner*, 324.)
2. SAME—SALE—DUPLICATE CERTIFICATE OF SALE FILED UNDER LAWS OF 1889, ACT NO. 20, SEC. 19, SUBD. 3, NEED NOT BE RECORDED—FILING CONSTRUCTIVE NOTICE.—A duplicate of a certificate of sale of real estate under execution filed, as provided by statute, *supra*, in the office of the county recorder, is not required to be recorded and the filing thereof is made constructive notice of such sale to subsequent purchasers. (*Webber v. Kastner*, 324.)
See Offices and Officers, 11, 13.

EXEMPTIONS.

1. EXEMPTIONS—CONSTRUCTION OF STATUTES.—Laws exempting property from execution for the payment of debts are to be liberally construed. (*Wilson v. Lowry*, 335.)
2. SAME—RIGHT TO CLAIM—GARNISHMENT—FAILURE TO PLEAD EXEMPTION.—Personal property exempt from execution can be claimed and designated at any time prior to its sale and conversion by the officer holding the execution, and failure of the claimant to protect his rights in garnishment proceedings or of garnishees to set up such exemption, is not conclusive of his rights, and he may still claim and designate the exemption so long as the money remains in the hands of either the garnishee or the officer. (*Wilson v. Lowry*, 335.)
3. SAME—OFFICE AND OFFICERS—SHERIFF—FAILURE TO RELEASE EXEMPT PROPERTY—LIABILITY—SURETIES.—Failure of a sheriff to

EXEMPTIONS (Continued).

release exempt property upon a proper demand is a violation of official duty for which he and the sureties upon his official bond are liable. (*Wilson v. Lowry*, 335.)

4. **SAME—SAME—SAME—CLAIM OF EXEMPTION—REV. STATS. ARIZ. 1887, TIT. 27, CITED.**—Upon a proper demand for release of property exempt from execution, it is the duty of the sheriff to proceed under the statute, *supra*. (*Wilson v. Lowry*, 335.)

5. **EXEMPTIONS—PERSONAL PROPERTY—MONEY DERIVED FROM INSURANCE ON REAL PROPERTY.**—Money received from an insurance policy on real property is personal property under the exemption laws of this territory. (*Wilson v. Lowry*, 335.)

See Offices and Officers, 16.

FEES. See Offices and Officers, 4, 5; Witnesses, 1, 2.

FELLOW SERVANTS. See Master and Servant, 2, 3, 4.

FINDINGS. See Appeal and Error, 11; Judgment, 1, 2.

FINDINGS OF FACT. See Judgment, 2.

FORCIBLE ENTRY AND DETAINER.

1. **FORCIBLE ENTRY AND DETAINER—ISSUES—RIGHT OF POSSESSION—PLEA TO JURISDICTION—TITLE INVOLVED.**—Under an action for forcible entry and detainer, the only issue is right of possession, and it is not error for the justice of the peace to overrule a plea that the court had no jurisdiction of the case for the reason that the title to the property was involved. (*Sullivan v. Woods*, 196.)

FRAUD.

1. **FRAUD—QUESTION OF FACT—EVIDENCE.**—Fraud is a question of fact under the code of this territory, and proof necessary to establish the same must be clear and conclusive. (*Hall v. Warren*, 127.)

FRAUDULENT CLAIMS AGAINST COUNTY. See Criminal Law, 13.

FRAUDULENT CONVEYANCES.

1. **FRAUDULENT CONVEYANCES—CREDITOR'S BILL—WIFE'S SEPARATE PROPERTY—EVIDENCE.**—When a wife has acquired property with her inheritance, creditors of her husband will not be permitted to subject such property to the payment of his debts where there is a failure to show any equities against the wife, or that she was guilty of any fraudulent representations or concealments or that such creditor ever acted or relied upon any of her expressed or implied representations, though it appears that for a certain time the husband managed the property and she permitted him to hold it out to the world as his own. (*Hall v. Warren*, 127.)

FRAUDULENT REPRESENTATIONS. See Real Property, 1.

FREIGHT TRAINS.

Right to eject passengers from. See Railroads, 1, 2.

FUNDING ACT. See Bonds, 3, 4, 5, 6, 7.

GARNISHMENT. See Exemptions, 2.

GENERAL FINDINGS. See Judgment, 1, 2.

GOOD FAITH. See Chattel Mortgage, 3.

GOVERNOR.

Power of removal. See Offices and Officers, 22.

GRAND JURY.

Charge to. See Criminal Law, 7.

GRANTORS.

Of properly initiated rights in public lands, who may question their power to transfer. See Public Lands, 6.

GUARANTORS. See Open Accounts, 1.

HABEAS CORPUS. See Offices and Officers, 4, 5.

HARMLESS ERROR. See Criminal Law, 8.

HARRISON ACT.

1. HARRISON ACT—"OBLIGATION"—DEFINED.—"Obligation" is defined to be "a tie which binds us to pay or do something agreeably to the laws and customs of the country in which the obligation is made." (McRae v. County of Cochise, 26.)

HOLIDAYS.

When not counted in computing time. See Answer, 1.

IDENTITY OF PARTIES. See Offices and Officers, 12.

ILLEGAL IMPRISONMENT. See Criminal Law, 15.

IMPLICATIONS. See Contract, 3.

IMPRISONMENT.

Illegal. See Criminal Law, 15.

IMPROVEMENTS. See Pleading, 8.

INDEBTEDNESS.

- Of counties. See Counties, 1, 2.
- Limit upon counties. See Constitutional Law, 1.

INDIANS.

1. INDIANS—CHILD OF WHITE MAN AND INDIAN—STATUS.—The *status* of a child of a void marriage between a white man and a Pima squaw is that of a Pima Indian. (Estate of Walker, 70.)

INDIAN RESERVATION. See Territories, 1.

INDICTMENT.

- Material allegation. See Criminal Law, 14.
- Motion to set aside must be supported by affidavit of record. See Criminal Law, 10.
- Sufficiency of. See Criminal Law, 13.

INJURY. See Master and Servant, 2, 3, 4.

INNOCENT PURCHASERS. See Conveyances, 1.

INSOLVENCY. See Chattel Mortgage, 1, 3.

INSTRUCTIONS. See Appeal and Error, 9; Criminal Law, 12, 18;
Railroads, 1; Trial, 1, 2; Witnesses, 3.

INTEREST. See Banks and Banking, 1.

INVOLUNTARY NONSUIT.

- Improper to grant. See Trial, 1.

IRRIGATION.

1. IRRIGATION—DAMAGES FOR FAILURE TO DELIVER WATER—SPECIAL CONTRACT—PLEADING—COMPLAINT—FAILURE TO STATE CAUSE OF ACTION.—A complaint in an action for damages for failure to deliver irrigating water to a particular tract of land, setting up a contract wherein defendant agrees to deliver water to the plaintiff at and on the basis rate of not less than three shares for the necessities of a quarter-section, said water being in the river, it being understood that in case of low water the defendant is to deliver the amount of water that the Utah Canal would or could deliver if they were in full control, and alleging that the tract was a part of the premises upon which the water was to be delivered under such contract, and that defendant failed, neglected, and refused to deliver water at the rate specified in the contract, or sufficient water to mature the crops upon said premises, there being water in the river, capable of being diverted by defendant, sufficient therefor; and that in the period of low water defendant failed, neglected, and refused to deliver to said

IRRIGATION (Continued).

premises the amount of water that the Utah Canal would or could deliver if they were in full control, and by reason, etc., fails to state a cause of action. Plaintiff fails to allege that he ever requested defendant to deliver water to him at any place; that he did not get all the water he contracted for; that the water contracted for was not delivered to plaintiff at some other point; fails to state the quantity necessary to irrigate said land, or the quantity actually delivered, nor is the difference capable of being computed; nor is there any allegation as to how much, or whether any quantity, could or would have been received by the plaintiff from the Utah Canal in periods of low water. (Consolidated Canal Co. v. Peters, 80.)

See Landlord and Tenant, 1.

ISSUES. See Attachment, 1; Claim and Delivery, 1, 4; Forcible Entry and Detainer, 1.

JOINT-STOCK COMPANY.

1. JOINT-STOCK COMPANY—MEMBERS—PARTNERS—ACTION—PARTIES—NECESSARY.—Shareholders in an unincorporated joint-stock company are partners, and ordinarily the members must all be joined in a suit upon a contract entered into between such members and a third party. (Consolidated Canal Co. v. Peters, 80.)
2. SAME—CONTRACTS—JOINT OR SEVERAL—ASSUMPTION OF DUTY TO RESPECTIVE PARTIES—SEVERAL—ACTION—PARTIES.—A contract between members of an unincorporated joint-stock company and defendant, in which defendant agreed "to deliver water to the respective parties," must necessarily be construed as a contract wherein, if any damage occurred thereunder to any of the parties thereto, such party could maintain his suit for such damages without joining the other parties. (Consolidated Canal Co. v. Peters, 80.)
3. SAME—SAME—SAME—SAME—CONSTRUCTION—SEVERAL—ACTION—PARTIES.—Where the language of a contract requires the obligor to account to each of the obligees, respectively, or, by the use of any words, imports a separate right of action, the contract is several, and each obligee may sue thereon. (Consolidated Canal Co. v. Peters, 80.)

JUDGMENT.

1. JUDGMENT—FINDINGS—GENERAL IN FAVOR OF DEFENDANT—LAWS 1897, ACT NO. 22, CONSTRUED—DAGGS v. HOSKINS, ANTE, P. 300, FOLLOWED.—A judgment based upon general finding of the issues in favor of the defendant is valid under the statute, *supra*. *Daggs v. Hoskins*, *supra*, followed. (McGowan v. Sullivan, 334.)
2. JUDGMENT—FINDINGS OF FACT—GENERAL FINDINGS—LAWS 1897, ACT NO. 22, SEC. 1, CONSTRUED.—Under the statute, *supra*, providing that "the facts found and the conclusions of law shall be sepa-

JUDGMENT (Continued).

ately stated," and not requiring that the findings shall be special, a general finding of the issues in favor of the defendants is sufficient to sustain a judgment of dismissal. (*Daggs v. Hoskins*, 300.)

Against sureties. See Appeal and Error, 4.

For money only. See Appeal and Error, 4.

In supreme court for amount and costs. See Appeal and Error, 4.

Modification of. See Appeal and Error, 6.

Of affirmation. See Appeal and Error, 4.

See Abatement, 1; Claim and Delivery, 3, 4; Courts, 2; Criminal Law, 15; Evidence, 4; Offices and Officers, 11, 12, 15; Pleading, 7, 13, 14, 16, 17; Taxes and Taxation, 4.

JUDICIAL NOTICE. See Evidence, 3.

JURISDICTION.

Of district court on appeal from probate court. See Appeal and Error, 7.

See Courts, 1, 2; Forcible Entry and Detainer, 1.

JURY. See Claim and Delivery, 2; Trial, 2.

KNOWN MINERALS. See Public Lands, 1.

LACHES.

1. LACHES—NOT ATTRIBUTABLE TO GOVERNMENT.—Laches is not attributable to the government. (*Smith v. United States*, 57.)

See Public Lands, 2.

LANDLORD AND TENANT.

1. LANDLORD AND TENANT—IRRIGATION—LEASE—IRRIGATED LAND—RIGHT TO WATER INCIDENT—COVENANT FOR QUIET POSSESSION — LESSORS NOT LIABLE FOR FAILURE TO MAINTAIN DITCH.—When lands leased are arid, and at the time of the entering into the lease water to irrigate the same is received through a certain community ditch, owned by those having lands to be irrigated therefrom, and kept up and maintained by the landowners, each one being entitled to the proportion of water therefrom that his land bears to the whole number of acres irrigated, the lessee succeeds to the rights and obligations of the lessor in the use of such water, in the absence of special covenants, and for the term of the lease said interest in the water of said ditch attaches to the land. Under such lease, containing a covenant for the peaceable and quiet possession of said premises, the lessor is not liable to lessee for failure to maintain and repair such ditch when the head was washed out by floods in the river. (*Stevens v. Wadleigh*, 90.)

See Mechanics' Liens, 2, 3, 4.

LEASE. See Landlord and Tenant, 1.

LEGISLATURE.

Powers of. See Territories, 1.

LESSORS.

Liabilities of. See Landlord and Tenant, 1.

LEVY.

Excessive. See Attachment, 4; Pleading, 11.

Mortgagee in possession, how made. See Attachment, 5, 6.

Of execution. See Offices and Officers, 11.

Sufficiency. See Executions, 1.

LIBEL. See Criminal Law, 15; Malicious Prosecution, 1.

LOAN COMMISSIONERS.

Board of, a continuous body. See Bonds, 5.

MAJORITY OF VOTES. See Schools, 1, 2.

MALICIOUS PROSECUTION.

1. MALICIOUS PROSECUTION—SLANDER AND LIBEL—COMPLAINT—SUFFICIENCY—DUPLICITY—MULTIFARIOUSNESS.—A complaint that defendants made, presented, subscribed, and swore to before the justice of peace a criminal complaint in writing against plaintiff, wherein defendants falsely, maliciously, and without any reason or cause accused her of having committed a felony; that a warrant for plaintiff was issued by said justice, upon which she was arrested by the sheriff of said county and carried before said justice, by whom she was arraigned and examined upon said charges and was promptly discharged; that said accusation, complaint, and each and every allegation thereof were and are false, malicious, and without probable cause, states facts sufficient to constitute a cause of action for malicious prosecution, and is not subject to demurrer for duplicity and multifariousness in that it attempts to join a cause of action for malicious prosecution and an action for slander and libel. (*Sullivan v. Garland*, 188.)

MARRIAGE.

1. MARRIAGE—COMMON LAW—PERSONAL PROPERTY OF WIFE—TITLE—POSSESSION BY HUSBAND—WAIVER OF RIGHT.—At common law the receipt of a wife's personalty did not of itself make it the property of the husband, unless it was received by him in the exercise of his marital rights, for the purpose of its appropriation to his own use. Such right could be enforced or waived at the husband's pleasure. If waived, the personalty remained the property of the wife. (*Hall v. Warren*, 127.)

MARRIAGE (Continued).

2. **MARRIAGE—WHITE MAN AND INDIAN—VOID IN 1871—COMP. LAWS ARIZ. 1877, SECS. 1-4, CHAP. 30, P. 317, CONSTRUED.**—Marriage in fact could not be consummated in 1871 in Arizona between a Pima Indian squaw and a white man, either by ceremony as provided by statute, *supra*, for persons capable of contracting the marital relation, by the customs of said Indian tribe, cohabitation, or any other method. Such marriages were null and void. (Estate of Walker, 70.)

MASTER AND SERVANT.

1. **MASTER AND SERVANT—ASSUMPTION OF RISK.**—A person entering the service of a corporation assumes all risk naturally incident to his employment, including the danger which may arise from the negligence of a fellow-servant. (Southern Pacific Co. v. McGill, 36.)
2. **SAME—INJURY—MASTER'S LIABILITY—FELLOW-SERVANTS—GRADATION IN EMPLOYMENT—PRINCIPAL.**—The master's liability does not depend upon gradations in the employment, unless the superiority of the person causing the injury was such as to make him principal or vice-principal. (Southern Pacific Co. v. McGill, 36.)
3. **SAME—SAME—SAME—SAME—DIFFERENT DEPARTMENTS.**—The liability of the master does not depend upon the fact that the servant injured may be doing work not identical with that of the wrongdoer. The test is, the servant must be employed in different departments which in themselves are so distinct and separate as to preclude the probability of contact and of danger of injury by the negligent performance of the duties of the servant in the other department. (Southern Pacific Co. v. McGill, 36.)
4. **SAME—SAME—SAME—SAME—CONDUCTOR ON WORK-TRAIN—SECTION FOREMAN—COMMON SUPERIOR.**—The conductor of a work-train and a section foreman, both engaged in clearing a piece of track under the direction of a common master, are fellow-servants, and the foreman cannot recover of the railroad company for injuries resulting from the negligence of such conductor occurring while carrying the foreman from such place of employment. (Southern Pacific Co. v. McGill, 36.)

MEASURE OF DAMAGES. See Bond, 1, 2.

MECHANICS' LIENS.

1. **MECHANICS' LIENS—PRINCIPAL AND AGENT—EVIDENCE OF AGENCY—EXCEPTIONS—REV. STATS. ARIZ. 1887, PARS. 2258 ET SEQ. AND PAR. 2260, CITED AND CONSTRUED.**—Agency in the matter of a contract for material and labor so as to bind the premises upon which it is placed under the Mechanic's Lien Act (par. 2258 et seq., *supra*) must be shown to exist as is required in other cases of agency, with the modification, however, which the statute (par. 2280, *supra*) makes,—

MECHANICS' LIENS (Continued).

to wit, that contractors, subcontractors, architects, and builders shall be the agents of the particular people for whom they act; and that the persons who have the charge or control of mines, mining claims, canals, etc., shall be regarded as the agents of the owners in and about the particular premises. (Gates v. Fredericks, 343.)

2. SAME—LANDLORD AND TENANT—PRINCIPAL AND AGENT—LESSEE NOT AGENT FOR LESSOR SO AS TO BIND LESSOR'S ESTATE FOR REPAIRS ORDERED BY LESSEE.—There is no statute nor principle of law which makes a leaseholder the agent of his lessor to hold the lessor or his estate in the property responsible under the Mechanic's Lien Act for material or labor furnished the leaseholder. (Gates v. Fredericks, 343.)
3. SAME—SAME—SAME—EVIDENCE OF AGENCY—INSUFFICIENT TO BIND LESSOR'S ESTATE.—Where lessees of a building spoke to appellant, a contractor, about some proposed repairs thereon, and said that they intended to speak to the owners of the building about it, and that afterwards said lessees told him he might go ahead and have the work done; that the lessors had said that the lessees would be allowed credit on their rent, such facts are insufficient to constitute the lessees agents of the lessor for the purpose of binding the lessor's estate for such repairs under the Mechanic's Lien Act, particularly where the owners testify that they had never authorized the lessees to have the work done. (Gates v. Fredericks, 343.)
4. SAME—SAME—LABOR ON PERSONAL PROPERTY OF LESSEES NOT CHARGEABLE AGAINST ESTATE OF LESSOR—REV. STATS. ARIZ. 1887, PAR. 2258, CITED AND CONSTRUED.—Work done by a contractor upon a bar, back bar, and screen which are the personal property of the lessees of a building cannot be charged against the real estate or the estate of the lessor in the property, under paragraph 2258, *supra*, which provides that any person who may labor or furnish material to erect any house or improvement or to alter or repair any building or improvement whatever shall have a lien on such house, building, fixtures, or improvement, and shall also have a lien on the lot or lots of land necessarily connected therewith to secure the payment therefor. (Gates v. Fredericks, 343.)

MINES AND MINING.

1. MINES AND MINING—ADVERSE SUIT—REV. STATS. U. S., SEC. 2326, CONSTRUED—PLEADING—CITIZENSHIP—EVIDENCE—RULE IN SUITS TO QUIET TITLE BETWEEN INDIVIDUALS INAPPLICABLE.—In an action to adverse the party applying for a United States patent to a mining claim, under section 2326, *supra*, it is necessary to both allege and prove that plaintiffs are citizens of the United States, or have declared their intention to become such. The rule that such allegation is unnecessary applies only to an action to quiet title between individuals. (Allyn v. Schultz, 152.)

MINES AND MINING (Continued).

2. **SAME—SAME—SAME—FORM OF ACTION.**—Section 2326, *supra*, does not provide what form of action shall be brought. It may be an ejectment, a suit to try the right to real property under the statute, or an action to quiet the title, or the form ordinarily used in adverse actions. (Allyn v. Schultz, 152.)
3. **SAME—PLEADING—GENERAL DEMURRER—DUTY OF COUNSEL TO CALL ATTENTION OF TRIAL COURT TO GROUND OF DEMURRER.**—Where the demurrer to a complaint is general, the point upon which it is based should be called directly to the attention of the trial court. It should not be formally submitted without argument, to be overruled. (Allyn v. Schultz, 152.)
4. **SAME—BOUNDARY-LINE—ESTOPPEL IN PAIS.**—Where the evidence in the case shows that plaintiff, locator and owner of the New Year, the adjoining claim, pointed out to the agent of defendant the boundary-line between the Mohawk and the New Year claims, and that upon such representation defendant was induced to purchase the Mohawk, plaintiffs are estopped from questioning the correctness of the line so established. (Allyn v. Schultz, 152.)
5. **SAME—SAME—SAME—RULE SAME AS IN OTHER KIND OF REAL ESTATE—BLAKE V. THORNE, 2 ARIZ. 347, 16 PAC. 271, CITED.**—The rules of law relating to estoppel in *pais* apply to mining ground the same as any other kind of real estate. *Blake v. Thorne, supra*, cited. (Allyn v. Schultz, 152.)
6. **SAME—SAME—SAME—PRIVY IN ESTATE BOUND.**—Where, after plaintiff pointed out the boundary-line between the claims to defendant's agent, he quitclaimed an interest to another of plaintiffs, she, as a privy to the estate, is bound by the same estoppels as her grantor. (Allyn v. Schultz, 152.)
7. **SAME—ACTION TO ADVERSE APPLICANT FOR PATENT—REV. STATS. U. S., SEC. 2326, AS AMENDED MARCH 3, 1881, CONSTRUED—PLEADING—NECESSARY ALLEGATIONS—PROOF—MUST RECOVER ON STRENGTH OF OWN TITLE.**—In cases under section 2326, *supra*, as amended March 3, 1881, each party is to establish his right to the mining ground in controversy against the United States as well as against his adversary. The party filing the contest should allege and prove every step necessary to establish his right to his mining claim that would be required in the land office for a patent, with the exception of advertisement and certificate of surveyor-general as to the amount of work required before patent could be obtained. He must recover on the strength of his own title, and not on the weakness of his adversary. (Allyn v. Schultz, 152.)
8. **SAME—ESTOPPEL IN PAIS—SALE OF MINING CLAIM.**—Where the evidence shows that John and Susana Bauer, two of the plaintiffs and part owners of the Mohawk claim, sold the strip of land in dispute to defendant as being a part of the Mohawk claim, they are estopped

MINES AND MINING (Continued).

from claiming the same ground as a part of the New Year or any location, so long as the Mohawk is a valid subsisting claim. (*Allyn v. Schultz*, 152.)

See Public Lands, 1.

MORTGAGE.

1. MORTGAGE—ACTION TO DECLARE DEED ABSOLUTE MORTGAGE—EVIDENCE—PREPONDERANCE INSUFFICIENT.—A mere preponderance in the evidence is insufficient to prove a deed absolute on its face a mortgage. It must be shown that it was executed, delivered, accepted, and intended as a mortgage by clear and certain and conclusive evidence. (*Sullivan v. Woods*, 196.)
2. MORTGAGES—DEED ABSOLUTE—SATISFACTION OF PRIOR MORTGAGE DEBTS—CONTEMPORANEOUS AGREEMENT TO RECONVEY—OPTION TO PURCHASE—EVIDENCE.—Where defendant, a mortgagor, in satisfaction of his mortgage debt, gave a deed absolute to his mortgagees of the mortgaged property, and took at the same time an agreement wherein the mortgagees bound themselves to allow him to repurchase within six months for the amount of the indebtedness and to reconvey, he to have the use of the premises in the mean time upon payment of fifteen dollars a month as interest, and the evidence shows that at the time the deed was made the note was surrendered and the mortgage canceled, such agreement is simply an option to purchase, the intention of all parties as shown by the transfer being to save the expense of foreclosure. (*Sullivan v. Woods*, 196.)

See Witnesses, 1, 2.

MORTGAGEE IN POSSESSION.

Levy, how made. See Attachment, 5, 6.

MOTION. See Practice, 1.

MULTIFARIOUSNESS. See Malicious Prosecution, 1.

MURDER. See Criminal Law, 6, 12, 16, 17, 18.

NATIONAL BANKS.

1. NATIONAL BANKS—TAXES AND TAXATION—SHARES—REV. STATS. U. S., SEC. 5219, CITED AND CONSTRUED—TERRITORIAL ACT (LAWS ARIZ. 1893, ACT NO. 85, APPROVED APRIL 13, 1893), IN CONFORMITY THEREWITH, VALID.—The power to tax national bank associations as fixed by section 5219, *supra*, is confined and limited to the shares of such associations, and such shares may be included in the valuation of the personal property of the owners and holders of such shares. The same taxes may be imposed on such shares as are im-

NATIONAL BANKS (Continued).

posed by the authority of the state on other personal property. The limitations on the power to tax such shares are: 1. "That the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state," and 2. "That the shares of any national banking association, owned by non-residents of any state, shall be taxed in the city or town where the bank is located, and not elsewhere." The statute of Arizona, *supra*, providing for the taxation of shares of national bank stock complies strictly with said act of Congress. (Consolidated National Bank v. Pima County, 142.)

2. SAME—SAME—SAME—FAILURE TO TAX SHARES OF BUILDING AND LOAN ASSOCIATIONS—INDIVIDUAL MONEY-LENDERS—DOES NOT AFFECT VALIDITY OF TAX.—The failure of the Revenue Act of Arizona to provide for taxing the shares of building and loan associations and of money of private citizens loaning money does not make the tax in question illegal. (Consolidated Nat. Bank v. Pima County, 142.)
3. SAME—SAME—SAME—ASSESSMENT AS PERSONALTY—VALID—LAWS ARIZ. 1893, ACT NO. 85, APPROVED APRIL 13, 1893, CITED AND CONSTRUED.—The assessment of shares of national bank stock as personal property, substantially in conformity with the law for the assessment of other personal property, is valid, though the act of April 13, 1893, specially prescribed a mode for the assessment of such shares, the purpose of such latter act being to provide a mode of ascertaining the ownership of such property, to the end that it might be assessed. (Consolidated Nat. Bank v. Pima County, 142.)

See Banks and Banking, 1.

NEGLIGENCE. See Ordinary Care, 1; Roads and Highways, 1.

NEGOTIABLE INSTRUMENTS.

1. NEGOTIABLE INSTRUMENTS—PRINCIPAL AND AGENT—ACCEPTANCE OF ADVANCE INTEREST PAID BY PRINCIPAL—RELEASE OF SURETY—RECEIPT OF INTEREST BY AGENT OF PAYEE—RATIFICATION.—The payee of a note does not by receiving advance interest paid to his agent, who was not authorized to receive any advance interest, ratify the unauthorized act of his agent so as to release a surety upon the note, unless he had full knowledge when he received the interest that it had been paid to such agent before it was due. (McGlassen v. Tyrrell, 51.)
2. SAME—ADVANCE INTEREST—RELEASE OF SURETY.—While the acceptance of interest in advance from the principal on an overdue note may operate as an extension of the time of payment, and thus release the surety, it is not conclusive. (McGlassen v. Tyrrell, 51.)
3. SAME—PRINCIPAL OR SURETY—EVIDENCE—ONE TO WHOM CREDIT GIVEN PRINCIPAL.—Evidence that McGlassen went to borrow three hundred dollars, but that the lender only agreed to make the loan

NEGOTIABLE INSTRUMENTS (Continued).

if Chandler would sign the note, is sufficient evidence to authorize a judgment against Chandler as the real party in interest, to whom the credit was given. (*McGlassen v. Tyrrell*, 51.)

See Bonds, 6, 7.

NEGOTIATION.

Of bonds. See Bonds, 6, 7.

NEW TRIAL.

Necessity for obviated by modification of judgment rendering error harmless. See Appeal and Error, 6.

See Criminal Law, 15.

NON-NEGOTIABLE INSTRUMENT. See Choses in Action, 1.

NONSUIT.

Involuntary not granted. See Trial, 1.

NOTICE.

Constructive. See Executions, 2.

Judicial. See Evidence, 3.

Of elections. See Schools, 3, 4.

OBLIGATION DEFINED. See Harrison Act, 1.

OFFICES AND OFFICERS.

1. OFFICES AND OFFICERS—BONDS—STATUTE FIXING AMOUNT—INCREASE BY EXECUTIVE OFFICER—VOLUNTARY BOND—DURESS.—Where the statute requires a bond of ten thousand dollars, a bond increased by the direction of the President of the United States to thirty thousand dollars, and voluntarily given, is not void as to the sureties on the ground of duress. (*Smith v. United States*, 57.)
2. SAME—SAME—REFUSAL TO STOP PAYMENT ON DRAFT IN HANDS OF DEFAULTING OFFICER—RELEASE OF SURETIES.—The refusal of an inspector of the interior department to telegraph to the treasury department to stop payment upon a draft in the hands of a defaulting public officer, when requested by a surety upon such officer's bond so to do, does not prevent the government from recovering the full amount of the bond from such surety. (*Smith v. United States*, 57.)
3. OFFICES AND OFFICERS—COUNTY TREASURER—DUTIES—SALARY AS EX-OFFICIO TAX-COLLECTOR—LAWS 1889, ACT No. 47; LAWS 1891, ACT No. 52; LAWS 1893, ACT No. 87, SEC. 4; LAWS 1895, ACT No. 51, CITED AND CONSTRUED.—Act No. 47, Laws 1889, *supra*, and Act No. 52, Laws 1891, *supra*, made treasurers in all counties *ex officio* tax-collectors, and Act No. 87, Laws 1893, section 4, *supra*, fixed the

OFFICES AND OFFICERS (Continued).

salaries of treasurers, and provided "that no county treasurer shall receive any compensation other than in this section provided." In 1895, the counties were reclassified, Laws 1895, Act No. 51, *supra*, and the annual salary of the treasurers of counties of each class as fixed therein were declared to be in full for services, except where otherwise provided. Upon putting Graham County into another class, the county treasurer thereof must continue to perform the same services theretofore required of him as *ex officio* tax-collector, and he cannot collect any other salary than that expressly prescribed by statute. (*Dysart v. County of Graham*, 123.)

4. OFFICES AND OFFICERS—COURT COMMISSIONERS NOT COUNTY OFFICERS—FEES AND SALARY—HABEAS CORPUS—REV. STATS. ARIZ. 1887, PARS. 647, 1967, 577, CONSTRUED.—A court commissioner, appointed pursuant to paragraph 647, *supra*, whose compensation is fixed by paragraph 1967, *supra*, at four dollars for each day employed, and fifty cents for each order, is not a county officer, and therefore is not within the provisions of paragraph 577, *supra*, relating to salaries and fees of county officers, providing "no fee or compensation . . . must be charged . . . by any officer . . . for services rendered upon *habeas corpus*." (*Cochise County v. Johnston*, 242.)
5. SAME—COUNTY OFFICERS—FEES—SALARY—HABEAS CORPUS—REV. STATS. ARIZ. 1887, PAR. 577, CONSTRUED—BENEFIT OF PETITIONER.—Paragraph 577, *supra*, is a provision for the benefit of those who may apply for the writ of *habeas corpus*, and is not intended to be an immunity of the county from paying county officers for such services. (*Cochise County v. Johnston*, 242.)
6. OFFICES AND OFFICERS—OFFICIAL BONDS—FAILURE OF PRINCIPAL TO SIGN—SEVERAL BONDS—SURETIES—LIABILITIES—REV. STATS. ARIZ. 1887, PARS. 3078, 3081, CITED AND CONSTRUED.—Paragraph 3078, *supra*, provides that "all official bonds shall be in form joint and several," and paragraph 3081, *supra*, provides that "when the penal sum . . . amounts to more than one thousand dollars, the sureties may become severally liable for portions of not less than five hundred dollars," etc. Where ten sureties have signed an official bond under the provisions of paragraph 3081, *supra*, each becomes severally liable, and in a suit upon such bond, the liability of the principal being fixed by law, and such principal having entered upon the duties of his office and received the emoluments thereof, and the sureties having signed the bond for the faithful performance of the duties of such office, it would be a good obligation against them, and for any default on his part they should be held, even in the absence of his signature as principal. (*Pima County v. Snyder*, 45.)
7. SAME—SAME—SAME—REV. STATS. ARIZ. 1887, PAR. 3079, CONSTRUED AND HELD DIRECTORY.—Paragraph 3079, *supra*, requiring the principal to sign an official bond where his liability is fixed by operation of law, is directory. (*Pima County v. Snyder*, 45.)

OFFICES AND OFFICERS (Continued).

8. SAME—SAME—SIGNATURE OF PRINCIPAL—NAMED IN BOND—SUFFICIENT TO BIND SURETIES.—Where the complaint shows that the name of the principal appears in the body of an official bond, and the bond is delivered and accepted as his official bond, the same is a valid signing of the bond, notwithstanding the omission of the final signature of such officer. (*Pima County v. Snyder*, 45.)
9. SAME—SAME—SAME—SIGNATURE TO OATH OF OFFICE—SUFFICIENCY TO BIND SURETIES.—Where the principal omits to sign his name to an official bond, but accepts the office, and has his bond signed by his sureties, and signs his name to the oath of office annexed to the bond, this is a signing of the bond, and his sureties must be held. (*Pima County v. Snyder*, 45.)
10. OFFICES AND OFFICERS—RECEIVER OF LAND OFFICE—BOND—RULINGS OF INTERIOR DEPARTMENT—NOT PART OF—CHANGE OF RULING—SURETIES—RELEASE OF.—It appears from the evidence that money misappropriated by the receiver of public moneys in the Tucson Land District was received by him for the sale of public lands, and for no other purpose. The ruling of the department of the interior in force at the time the defendant's bond was executed was, that payments before entry had been allowed and certificate given simply made the receiver of the land office the agent of the entryman, and were not public moneys. Subsequent thereto, and in view of such misappropriation, it was ruled that the moneys so paid were public moneys, and upon such later ruling the government issued patents to entrymen whose payments were misappropriated. *Held*, the former ruling was no part of the contract between the sureties upon the receiver's bond and the government, and that the moneys being in fact public moneys, a mere change in the ruling of the department as to what were public moneys did not release the sureties from their liability upon his bond. (*Smith v. United States*, 57.)
11. OFFICES AND OFFICERS—SHERIFF—DAMAGES—CONVERSION OF PROPERTY—LEVY OF EXECUTION—EVIDENCE—ADMISSIBILITY—JUDGMENT IN FORMER ACTION WHERE MEASURE OF DAMAGES DIFFERENT.—In an action by Daniel Noonan against Gray, as sheriff, and the sureties of his official bond, for damages caused by the levy of an execution against Mrs. J. A. Noonan, on certain personal property belonging to plaintiff of the value of \$1,395, to which defendants pleaded a general denial, a judgment-roll in a former case of plaintiff against one Gray individually which shows that such judgment was on a complaint for the value of the property and for injury to the business of plaintiff is not competent evidence of the value of the property taken, that being the sole measure of damages in the present case. (*Gray v. Noonan*, 167.)
12. SAME—SAME—SAME—EVIDENCE—JUDGMENT—IDENTITY OF PARTIES—ADMISSIBILITY.—Where there is no evidence to show that in the judgment in a former case rendered against Gray individually the

OFFICES AND OFFICERS (Continued).

- said Gray is the Gray, sheriff, named as defendant in the present suit, such judgment-roll is inadmissible. (Gray v. Noonan, 167.)
13. ~~SAME—SAME—SAME—SAME—EXECUTION—FAILURE TO SHOW CONVERSION.~~—In an action against a sheriff and his sureties for conversion of property by said sheriff, where the execution under which it is alleged he took possession of the property fails to show that it was ever in his hands or those of his deputies, and there is no other evidence that such sheriff took possession of such property as an individual or at all, judgment should go for the defendants. (Gray v. Noonan, 167.)
14. ~~SAME—SAME—OFFICIAL BONDS—SURETIES—LIABILITY FOR ACTS UNDER COLOR OF OFFICE AS WELL AS BY VIRTUE OF OFFICE.~~—The weight of authority and the better reasons are in favor of holding the sureties on the official bond of a sheriff responsible for acts of such sheriff done *colore officii* as well as those done *virtute officii*. (Gray v. Noonan, 167.)
15. ~~SAME—SAME—SAME—SAME—EVIDENCE—ADMISSIBILITY—JUDGMENT AGAINST SHERIFF INDIVIDUALLY.~~—In an action against a sheriff and sureties upon his official bond for conversion of property by such sheriff, evidence of a judgment against such sheriff as an individual for the conversion of the same property is not admissible as against the sureties, the parties to such judgment alone being bound thereby. (Gray v. Noonan, 167.)
16. ~~OFFICES AND OFFICERS—SHERIFF—EXEMPTION—FAILURE TO PAY OVER MONEY EXEMPT—LIABILITY—REV. STATS. ARIZ. 1887, PAR. 502, INAPPLICABLE.~~—The statute, *supra*, authorizing the recovery of money, with twenty-five per cent damages and ten per cent per month interest, from a sheriff into whose hands money has come by virtue of his office, and who neglects or refuses on demand to pay over the same to the party entitled thereto, is inapplicable to a case where a sheriff refuses to pay over on demand money exempt from execution, held under garnishment. (Wilson v. Lowry, 335.)
17. ~~OFFICES AND OFFICERS—SHERIFF—SALARY—GILA COUNTY—LAWS 1895, ACT NO. 51, AND REV. STATS. ARIZ. 1887, PAR. 1989, CONSTRUED.~~—Act No. 51, *supra*, reclassifying counties for the purpose of fixing the compensation of county officers, and changing Gila County from a county of the third to one of the fifth class, deprives the board of supervisors of said county of the power of allowing a salary to the sheriff, in addition to his fees, under paragraph 1989, *supra*, which provides that in a county of the third class the sheriff, in addition to fees, might receive such salary as the board of supervisors should allow, not exceeding six hundred dollars. (Williamson v. Gila County, 237.)
18. ~~OFFICES AND OFFICERS—SUPERVISORS—ACTION FOR COMPENSATION—COMPLAINT—INSUFFICIENCY—LAWS 1889, ACT NO. 15, SEC. 1, CONSTRUED.~~—In an action for compensation for services rendered as

OFFICES AND OFFICERS (Continued).

a member of the board of supervisors, a complaint which alleges that "plaintiff rendered services in his attending and acting at regular, adjourned, and lawfully called special sessions of said board" is subject to a general demurrer, it not being alleged therein that any county business was transacted upon the days for which compensation is sought, and the statute, *supra*, providing for compensation "five dollars per day for each day's actual attendance at the sitting of said board at which sitting any county business is transacted." (Reilly v. County of Cochise, 380.)

19. SAME—SAME—SAME—COMPLAINT ALLEGING USURPATION OF OFFICE—FAILURE TO ALLEGE TRANSACTION OF BUSINESS BY DE JURE BOARD—PRESUMPTIONS.—When the complaint for compensation for services as a member of the board of supervisors shows that during the time the services were alleged to have been rendered he and the other members of the lawful board were excluded from office by certain usurpers, and fails to allege that the business of the county was transacted by the *de jure* board, it will be presumed to have been transacted by the *de facto* board. (Reilly v. County of Cochise, 380.)
20. SAME—SAME—VOLUNTARY PAYMENTS FOR BENEFIT OF COUNTY—NOT RECOVERABLE.—No recovery can be had on account of a voluntary payment made by a member of the board of supervisors on account of costs and expenses in a suit by the county where there is no showing that plaintiff was authorized to make the payments and expenditures, nor that they were subsequently ratified. (Reilly v. County of Cochise, 380.)
21. SAME—SAME—VOLUNTARY EXPENDITURE IN ATTENDANCE UPON SUIT BY COUNTY—NOT RECOVERABLE.—Voluntary expenditures for travel, board, and lodging while attending a hearing on a suit by the county, made by a member of the board of supervisors, are not recoverable, no showing being made that plaintiff was authorized or requested by the county to be present. (Reilly v. County of Cochise, 380.)
22. OFFICES AND OFFICERS—TERRITORIAL TREASURER—GOVERNOR—POWER OF REMOVAL—REV. STATS. ARIZ. 1887, PARS. 2978, 3049; LAWS ARIZ. 1891, ACT NO. 65, APPROVED MARCH 19, 1891, CITED AND CONSTRUED—ORGANIC ACT.—Paragraph 2978, *supra*, providing for the office of territorial treasurer, fails to fix the tenure. Paragraph 3049, *supra*, provides that every officer whose term is not fixed by law holds at the pleasure of the appointing power. Laws 1891, Act No. 65, provides that the governor has power to remove from office any territorial officer appointed by him or his predecessor, or who has been so appointed by and with the advice of the legislative counsel, when, in his judgment, the best interest of the public service shall be subserved thereby; and an official letter to the effect that it is the desire of the governor that the office be vacated constitutes sufficient notice to the incumbent. Under these

OFFICES AND OFFICERS (Continued).

statutes, the governor has the power to remove the territorial treasurer from office. These acts are not contrary to the Organic Act, which nowhere prohibits such laws, but is a rightful subject of legislation and therefore permitted. (*Cole v. Territory of Arizona*, 137.)

23. SAME—COMMON LAW—PROPERTY IN OFFICE—JUDGMENT OF OUSTER—NO APPLICATION IN THIS TERRITORY.—The common law, which regards the office as a hereditament, and that an incumbent has a property in his office, and that he cannot be deprived thereof without a judgment of a court, has no force in this territory. (*Cole v. Territory of Arizona*, 137.)

See Exemptions, 3, 4.

OFFICIAL BONDS. See Offices and Officers, 6, 7, 8, 9.

OPEN ACCOUNTS.

1. OPEN ACCOUNTS—PLEADING—ANSWER—VERIFICATION—GUARANTORS REV. STATS. ARIZ. 1887, PAR. 1880, INAPPLICABLE.—Paragraph 1880, *supra*, providing that when any action or defense is founded upon an open account, supported by the affidavit of the party, the same shall be taken as *prima facie* evidence thereof, unless the defendant shall file a written denial under oath, and where the defendant fails to file such affidavit he shall not be permitted to deny the account, is not applicable as against guarantors upon an open account. (*Pilling v. St. Louis Refrigerator etc. Co.*, 377.)

See Pleading, 14, 15.

OPTION TO PURCHASE. See Mortgages, 2.

ORAL CONTRACT.

Executory, to convey lands, partly executory. See Pleading, 8.

ORDINARY CARE.

1. ORDINARY CARE—DEFINED—NEGLIGENCE—WHAT CONSTITUTES—RELATIVE TO EXISTING CIRCUMSTANCES.—Ordinary care is that degree of precaution which ordinarily prudent persons would exercise under like circumstances. The failure to exercise such care is negligence. Negligence is therefore never absolute or intrinsic, but is always relative to the existing circumstances. (*Stanfield v. Anderson*, 1.)

See Roads and Highways, 1.

PARTIES. See Action, 1; Joint-Stock Company, 1, 2, 3; Witnesses, 2.

PARTNERS. See Joint-Stock Company, 1.

PATENT. See Public Lands, 1, 2.

PAYMENT.

Voluntary by supervisors for benefit of county not recoverable.

See Offices and Officers, 20, 21.

PERSONAL PROPERTY.

1. PERSONAL PROPERTY—DEFINED—STATUTORY CONSTRUCTION—REV. STATS. ARIZ. 1887, PAR. 2932, CITED.—In the rules prescribed for the construction of the statutes of this territory, the words "personal property" are defined to include money, goods, chattels, things in action, and evidences of debt. Statutes, *supra*, cited. (Wilson v. Lowry, 335.)

See Exemptions, 5; Marriage, 1.

PLEA IN BAR. See Pleading, 16, 17; Public Lands, 2.

PLEADING.

1. PLEADING—ANSWER—VERIFICATION—DENIAL OF CONTRACT NOT ALLEGED TO BE IN WRITING—REV. STATS. ARIZ. 1887, PAR. 735, CONSTRUED.—Paragraph 735, *supra*, providing that any answer setting up a denial of the execution of any instrument in writing upon which any pleading is founded in whole or in part, and charged to have been executed by him or his authority, shall be verified by affidavit, does not require the verification of an answer to a complaint which fails to set up a written contract either *in extenso* or in substance with the allegation of its execution, though the contract alleged by its nature would have to be in writing. (Pilling v. St. Louis Refrigerator etc. Co., 377.)
2. PLEADING—BREACH OF CONTRACT—FAILURE TO STATE CAUSE OF ACTION—HOW REACHED.—A complaint that totally fails to state a breach of the contract sued on states no cause of action, and a failure to state a cause of action may be availed of by demurrer, by objection to the evidence, by motion for judgment on the pleadings, by motion in arrest of judgment, or on motion for a new trial. (Consolidated Canal Co. v. Peters, 80.)
3. PLEADING—COUNTERCLAIM—SUFFICIENCY.—A counterclaim, to be good, must contain every allegation which would be needed in a complaint founded on the same cause of action. (Daggs v. Phoenix National Bank, 409.)
4. SAME—SAME—SAME—AGAINST ASSIGNEE OF NON-NEGOTIABLE NOTE—MUST ALLEGE DILIGENCE IN COLLECTING—WHERE IT APPEARS THAT THERE WAS SECURITY IT MUST ALLEGE AN ATTEMPT TO ENFORCE SAME AND FAILURE.—Where a counterclaim only alleges that plaintiff assigned to defendant a non-negotiable promissory note, past due, and that at the time of the assignment the makers were insolvent, and were still insolvent, and that the same had not been paid, it fails to state a cause of action. No allegation is made that due diligence was used, as is required by statute, or that any effort

PLEADING (Continued).

was made to collect the same, which omission is doubly fatal, for the reason that it appears on the face of the note that it was secured by chattel mortgage. With this appearing, the mere allegation of the insolvency of the maker was not sufficient to charge the indorser as surety without an allegation of the exercise of due diligence to collect the same and to enforce the security, and a failure after such effort to collect. (*Daggs v. Phoenix National Bank*, 409.)

5. PLEADING—COUNTERCLAIM—VERIFICATION—SUFFICIENCY OF UNVERIFIED DENIAL—EXCEPT AS TO MATTERS REQUIRED BY REV. STATS. ARIZ. 1887, PAR. 735, TO BE DENIED UNDER OATH.—An unverified general denial to a verified counterclaim is sufficient to put the defendant on proof, except as to any matter therein pleaded, which, by statute, *supra*, is required to be denied under oath. (*Daggs v. Phoenix National Bank*, 409.)
6. SAME—SAME—SAME—VERIFIED ALLEGATION OF ASSIGNMENT IN WRITING ADMITTED BY FAILURE TO DENY UNDER OATH—REV. STATS. ARIZ. 1887, PAR. 735, SUBD. 5, CONSTRUED.—An allegation in a verified counterclaim that a note therein set up was assigned by the plaintiff to the defendant by an instrument in writing is admitted, under statute, *supra*, by failure to verify the denial thereof. (*Daggs v. Phoenix National Bank*, 409.)
7. PLEADING—DEMURRER—SEPARATE ANSWERS—JUDGMENT ON PLEADING.—In an action of ejectment it is error for the trial court, upon sustaining a demurrer to a separate defense of an answer, to grant a motion by plaintiff for judgment on the pleadings, where there still remains a plea of "not guilty" and a plea of the statute of limitations. (*Latimer v. Hamill*, 274.)
8. SAME—ANSWER—SUFFICIENCY—REAL PROPERTY—ORAL EXECUTORY CONTRACT TO CONVEY LAND PARTLY EXECUTED—STATUTE OF FRAUDS—POSSESSION—IMPROVEMENTS.—An answer to a complaint in ejectment states facts sufficient to constitute a good defense where it alleges a part performance of an oral executory contract for a deed to the land described, taking it out of the statute of frauds, and that the party making the defense has been in the notorious and exclusive possession of the property under the contract, and in pursuance of the same has made lasting and valuable improvements thereon. (*Latimer v. Hamill*, 274.)
9. PLEADING—DEMURRER—SEPARATE COUNTS.—Where a complaint contains several counts, a general demurrer thereto upon the ground that it fails to state facts sufficient to constitute a cause of action will be overruled if either one of the counts be sufficient. (*Palmer v. Breed*, 16.)
10. SAME—SEPARATE COUNTS—INSUFFICIENCY OF COUNT—HOW REACHED—SEPARATE DEMURRER.—The proper procedure where there are sev-

PLEADING (Continued).

eral counts in the complaint, and one or more be insufficient, is to demur to each of such counts separately. (Palmer v. Breed, 16.)

11. SAME—ATTACHMENT—EXCESSIVE LEVY — DAMAGES — COMPLAINT—SUFFICIENCY.—A complaint which alleges that defendant in a suit against plaintiff for \$702.13 caused the sheriff to levy a writ of attachment upon plaintiff's property to the amount of \$6,500, and furthermore procured the sum of \$662 due plaintiff to be garnished; that such levies were excessive and unreasonable, and were made at defendant's direction, wantonly, and with a view to oppress and injure plaintiff, and did oppress and injure him to his damage, etc., states a cause of action. (Palmer v. Breed, 16.)
12. PLEADING—EVIDENCE—VARIANCE—TRIAL—LEAVE TO AMEND—AFTER CLOSE OF EVIDENCE—DISCRETIONARY.—The action of the trial court in permitting plaintiff to amend his complaint to conform to the evidence, after the close of plaintiff's evidence and motion by defendant for dismissal of the action for variance between pleading and proof, is discretionary. (Consolidated Canal Co. v. Peters, 80.)
13. PLEADINGS—JUDGMENT ON—DENIAL—SUFFICIENCY—FACTS PLEADED INSUFFICIENT TO SUPPORT JUDGMENT.—A motion for judgment upon a verified counterclaim because there is no verified reply thereto is properly denied where it appears that there is an unverified general denial which puts in issue some of the allegations thereof, and where it further appears that, had no reply been filed, the facts pleaded were not sufficient to support a judgment therein. (Daggs v. Phoenix National Bank, 409.)
14. PLEADING—OPEN ACCOUNT—VERIFIED UNDER REV. STATS. ARIZ. 1887, PAR. 1880—ANSWER—SUFFICIENCY—JUDGMENT ON PLEADINGS.—In an action for balance of an unpaid account, defendant answered with a general denial, and set up a counterclaim alleging mutual accounts and a balance due him. To the counterclaim, and made a part thereof, was attached a verified account showing various items of indebtedness constituting the same. To this counterclaim plaintiff filed a verified reply, admitting that there were such mutual accounts, but alleging that the same had been settled, and that a balance thereon was found due plaintiff, which was agreed to by defendant, and that thereafter defendant had made payments on such balance, reducing it to the amount claimed by plaintiff in his complaint, which was still due and unpaid. Under the pleadings, defendant's motion for judgment on the pleading, on the ground that there was no sufficient denial under oath, as required by paragraph 1880, *supra*, of the verified account pleaded in said counterclaim, was properly denied. (Molino v. Blake, 319.)
15. SAME—OPEN ACCOUNT—ACCOUNT STATED — COMPLAINT — REPLY—REPUGNANCY — CONSTRUCTION — EVIDENCE.—Where plaintiff's complaint is for a balance due upon an open account, and defendant counterclaims upon mutual accounts, and plaintiff in reply thereto

PLEADING (Continued).

sets up an account stated and a balance due thereon, the same as pleaded in the original account, it is not error to permit plaintiff to testify as to an account stated, the complaint and reply not being repugnant, and therefore to be construed together. (*Molino v. Blake*, 319.)

16. PLEADING—PLEA IN BAR—JUDGMENT ON DEMURRER—WHEN GOOD.—A final judgment on a demurrer to a complaint can be pleaded in bar of a subsequent action between the same parties only when the demurrer went to the merits and cause of action is the same. (*Wilson v. Lowry*, 335.)

17. SAME—SAME—JUDGMENT ON GENERAL DEMURRER—ADDITIONAL MATERIAL ALLEGATIONS—CHANGE IN CAUSE OF ACTION.—Where judgment is entered upon a general demurrer that the complaint does not state facts sufficient to constitute a cause of action, such judgment is not a bar to a subsequent action between the same parties, the complaint alleging substantially the same facts, but adding material averments wanting in the original complaint, as such averments change the cause of action. (*Wilson v. Lowry*, 335.)

18. PLEADING—PRINCIPAL AND AGENT—DECLARATION AGAINST PRINCIPAL—EVIDENCE OF CONTRACT WITH AGENT—ADMISSIBILITY.—In an action to recover commission for the sale of a mine, evidence as to a contract for such commission made with an agent of defendant is admissible, though the pleading declares upon a contract with the principal direct. (*Root v. Fay*, 19.)

See Claim and Delivery, 1, 4; Counties, 2; Irrigation, 1; Mines and Mining, 1, 3, 7; Open Accounts, 1; Public Lands, 2.

POSSESSION. See Ejectment, 1, 2; Forcible Entry and Detainer, 1; Marriage, 1; Pleading, 8.

POST-OFFICE.

1. POST-OFFICE—ACTION TO RECOVER MONEYS ILLEGALLY RETAINED—EVIDENCE—ORDER OF POSTMASTER-GENERAL—CERTIFIED COPY OF DEPARTMENT ACCOUNT—1 SUPP. REV. STATS. U. S., CHAP. 259, SEC. 1, P. 358, AND REV. STATS. U. S., SEC. 889, CONSTRUED.—In an action by the United States against a postmaster for moneys illegally retained, an order made by the postmaster-general declaring that defendant had made false returns of the business of his post-office and ordering a readjustment of his account, under section 1, *supra*, a statement of account prepared by the department based thereon, showing a balance due to the government from defendant, duly certified, is competent evidence under section 889, *supra*. (*United States v. Marks*, 404.)
2. SAME—SAME—SAME—PRIMA FACIE—MAY BE REBUTTED—1 SUPP. REV. STATS. U. S., CHAP. 259, SEC. 1, P. 358, AND REV. STATS. U. S., SEC. 889, CONSTRUED.—In an action by the United States against a

POST-OFFICE (Continued).

postmaster for moneys illegally retained, an order made by the postmaster-general declaring that defendant has made false returns, and ordering a readjustment of his accounts, under section 1, *supra*, a statement of account based thereon showing a balance due the government from defendant duly certified, his official bond, and a demand on defendant for the amount due, while making a *prima facie* case against defendant, is not conclusive, and may be rebutted by competent evidence. (United States v. Marks, 404.)

PRACTICE.**1. PRACTICE—ERROR CORAM NOBIS OBSOLETE—REMEDY BY MOTION.—**

The writ of error *coram nobis* has become obsolete, having been superseded by the modern practice of applying to the court by motion for the relief sought. (Billups v. Freeman, 268.)

See Criminal Law, 6; Trial, 1, 2.

PRE-EMPTION. See Public Lands, 1, 2.

PREFERENCE. See Chattel Mortgage, 1, 3.

PREPONDERANCE OF EVIDENCE.

Insufficiency in action to declare a deed absolute a mortgage.
See Mortgage, 1.

PRESUMPTION. See Appeal and Error, 10, 13; Evidence, 4, 5; Offices and Officers, 19.

PRIMA FACIE EVIDENCE. See Taxes and Taxation, 1.

PRIMA FACIE CASE. See Evidence, 8; Post-Office, 2.

PRINCIPAL. See Master and Servant, 2.

PRINCIPAL AND AGENT.**1. PRINCIPAL AND AGENT—ATTORNEY IN FACT—AGENCY—REVOCATION BY DEATH OF PRINCIPAL—DEED—VOID.—**

A deed executed by an attorney in fact after the death of his principal is void. (Green v. Tuttle, 179.)

2. PRINCIPAL AND AGENT—EVIDENCE—AGENCY—CIRCUMSTANCES—INSUFFICIENCY.—

Evidence was that plaintiff entered into a contract with one Mathews for a commission for inducing the owners of a certain mine to make a trade; that he secured an option thereon and put the owners and Mathews in communication; that after making this contract Mathews went to Denver, where the defendant, Root, lived; that Root came and examined the mine; that one of the owners received a telegram at San Francisco, California, from Kingman, Arizona, where the mine was, signed J. H. Mathews, requesting him

PRINCIPAL AND AGENT (Continued).

to go to Los Angeles and meet Mathews; that upon arriving he was met by one Barry, who said, "We are Mathews," and introduced Root; that Root had accompanied Barry to California, but denied all knowledge of the telegram, and, though the sale of the mine was consummated at that time, denied all responsibility for the commission. Though agency may be implied from acts and circumstances, the evidence is insufficient to establish that Mathews was the agent of Root. (*Root v. Fay*, 19.)

See *Mechanics' Liens*, 1, 2, 3; *Negotiable Instruments*, 1; *Pleading*, 18.

PRINCIPAL OR SURETY. See *Negotiable Instruments*, 3.

PRIVY IN ESTATE.

Bound by estoppel. See *Mines and Mining*, 6.

PROBATE COURT. See *Appeal and Error*, 7.

PROOF.

Variance. See *Criminal Law*, 14.

See *Mines and Mining*, 7.

PROPERTY IN OFFICE.

None in Arizona. See *Offices and Officers*, 23.

PUBLIC LANDS.

1. **PUBLIC LANDS—PRE-EMPTION—PATENT—CANCELLATION—KNOWN MINERALS—MINES AND MINING—REV. STATS. U. S. SEC. 2258, CONSTRUED.**—Under section 2258, *supra*, the existence of salines or minerals must be known at the time of entry to defeat a patent acquired under the Pre-emption Act. A suit to cancel a patent issued under a pre-emption cash entry cannot be sustained where the evidence fails to show that any known mineral deposit of any value existed on the land in question at the date of entry, though it does appear that the land contains some mineral which has proven unprofitable to work. (*Blackburn v. United States*, 162.)
2. **SAME—SAME—SAME—SAME—PLEADING—IN BAR—LACHES.**—A plea in bar of the lapse of time from the entry of the land to the time of the institution of a suit by the United States to cancel a pre-emption patent, showing that suit was commenced twelve years after the cause of action accrued, and that during that time innocent purchasers acquired interests in the land, should be sustained. (*Blackburn v. United States*, 162.)
3. **PUBLIC LANDS—RIGHT TO ENTER AND SETTLE UPON LANDS ALREADY OCCUPIED.**—A person has no right to enter and make settlement

PUBLIC LANDS (Continued).

upon public land settled upon and improved by others so long as such settlers or their grantees, by use, occupation, and cultivation, keep alive the rights they have initiated. (*Tidwell v. Chiricahua Cattle Co.*, 352.)

4. SAME—UNLAWFUL INCLOSURES—ACT OF CONGRESS OF FEBRUARY 25, 1885, CHAP. 149, SEC. 1, 23 STATS. 321, CONSTRUED—INAPPLICABLE TO TRACTS OF LESS THAN ONE HUNDRED ACRES OF LAND HELD IN GOOD FAITH UNDER CONVEYANCES OF RECORD—TRESPASS.—The statute, *supra*, has no application to the fencing of a tract of less than one hundred acres settled upon, cultivated, and irrigated, and held under conveyances of record, whether valid or invalid, under which the occupant claims in good faith. The defendant could not have made a lawful entry on the land of plaintiff so inclosed, but was a mere trespasser. (*Tidwell v. Chiricahua Cattle Co.*, 352.)
5. PUBLIC LANDS—RIGHT OF CORPORATION TO HOLD—EJECTMENT—CANNOT BE QUESTIONED EXCEPT BY GOVERNMENT.—The question as to the power and authority of a corporation to take, own, or hold in possession unsurveyed public land of the United States cannot be raised by a defendant in ejectment, being only open to question in a direct proceeding instituted by the government for that purpose. (*Tidwell v. Chiricahua Cattle Co.*, 352.)
6. SAME—INITIATION OF RIGHT—QUALIFICATIONS—RIGHTS INITIATED PROPERLY—MAY BE TRANSFERRED TO ALIEN OR CORPORATION—POWERS OF GRANTORS—WHO MAY QUESTION.—While a qualified citizen can initiate a right to a tract of public land from which there can be perfected a title in fee, the rights thus initiated are property, susceptible of sale and transfer even to aliens, corporations, or other persons not capable of initiating such rights, and such grantees may own, possess, hold, enjoy, sell, transfer, and execute competent conveyances thereof, and the incapacity of such persons to originally initiate such right, or to subsequently perfect title, can be called in question only by the sovereign, and cannot be invoked by a stranger to attack their right of possession or the validity of their conveyances to subsequent grantees. (*Tidwell v. Chiricahua Cattle Co.*, 352.)

See Ejectments, 3.

PUBLIC USE. See Constitutional Law, 2.

PUNISHMENT OF CHILD.

Priest's right to inflict. See Criminal Law, 1.

QUANTUM MERUIT. See Brokers, 3.

QUESTION OF FACT.

Fraud is. See Fraud, 1.

RAILROADS.

1. **RAILROADS — CARRIERS OF PASSENGERS — EJECTING PASSENGERS — FREIGHT-TRAINS — EVIDENCE — INSTRUCTIONS FOR DEFENDANT.** — Where the evidence shows that plaintiff was at a small way-station on defendant's road; that at that time there was no station-agent there; that a train came along going west to Williams, to which point plaintiff wished to go, which was made up of freight-cars, two empty passenger-cars, and a car of the superintendent of the road; that the train, as the result of a signal, slowed up, and plaintiff boarded one of the passenger-cars while it was still in motion; that he tendered to the conductor his fare; that the conductor was making change when the superintendent told the conductor that plaintiff would have to get off; that the train was thereupon stopped within one and a half miles of the station and plaintiff was asked to get off, and his money was returned; that it was daytime, and plaintiff got off the train without force or violence and walked to and reached the station without any physical injury; that the train was a special freight-train and was not authorized to carry passengers; and that it was against the rules of the company to carry passengers on that train, an instruction to the jury to return a verdict for the defendant upon the motion of defendant is proper. (Roberts v. Smith, 368.)
2. **SAME—SAME—RIGHT TO DESIGNATE ON WHAT TRAINS PASSENGERS MAY RIDE.**—Railroad companies have the right to designate on what trains passengers may ride, and it is not the right of persons seeking passage over railroads to elect for themselves what trains they may ride on. (Roberts v. Smith, 368.)

REAL PARTY IN INTEREST. See Action, 1.

REAL PROPERTY.

1. **REAL PROPERTY — DEED — FRAUDULENT REPRESENTATIONS—VOID.**—Where it appears that a wife, under the belief that her husband was still living, joins in the execution of a deed made by her husband's attorney in fact, at the request of such attorney in fact, he having knowledge of the death of the husband, and representing to the widow that it was the husband's wish that she should sign it, such deed is void. (Green v. Tuttle, 179.)
2. **SAME—COMMUNITY PROPERTY—CONVEYANCE BY HUSBAND—NECESSITY OF WIFE JOINING—REV. STATS. ARIZ. 1887, PAR. 2102, CONSTRUED.**—Real estate which was community property, and held in the name of the husband alone, and over which he had entire control, could be sold and conveyed by him without his wife joining in the deed as fully as though she had joined. PAR. 2102, *supra*. (Green v. Tuttle, 179.)
3. **SAME—DOWER—ACT OF CONGRESS OF MARCH 3, 1887, CHAP. 397, SEC. 18, HAS NO APPLICATION IN THIS TERRITORY.**—There is no dower

REAL PROPERTY (Continued).

in this territory and section 18, *supra*, providing for the release of dower has no application therein. (Green v. Tuttle, 179.)

4. **SAME—DEED — CONSIDERATION — NECESSITY FOR.**—A deed without consideration is void. (Green v. Tuttle, 179.)

See Pleading, 8.

RECORD.

No error apparent on face of. See Appeal and Error, 2.

See Criminal Law, 6, 9.

RECORD TITLE. See Conveyances, 1.

RELEASE OF SURETY. See Negotiable Instruments, 1, 2; Offices and Officers, 2, 10.

REPLY. See Pleading, 15.

REPUGNANCY. See Pleading, 15.

RESERVATION.

Marriage of white man and Indian on, void. See Territories, 1.

RETURNS OF ELECTION BOARD.

Conclusive upon canvassing board. See Elections, 1.

Prima facie evidence of number of votes cast. See Elections, 1.

REVIEW. See Appeal and Error, 8, 9, 10, 11, 12, 13; Criminal Law, 6.

REVOCATION OF AGENCY.

By death of principal. See Principal and Agent, 1.

REWARDS. See Constitutional Law, 1.

ROADS AND HIGHWAYS.

1. **ROADS AND HIGHWAYS—RIGHTS AND DUTIES OF USERS—ORDINARY CARE—NEGLIGENCE — EVIDENCE—DIRECTION OF VERDICT.**—The right of a pedestrian and a horseman to use the public highway being equal, and both alike being under reciprocal obligations to exercise ordinary care,—the one to avoid doing injury, the other to avoid being injured,—it is error for the court to direct a verdict for the defendant where the evidence is, that the plaintiff was walking in the highway; that he had just passed over the ground where the road was soft and covered with straw, which deadened the noise of a horseman who rapidly approached from behind, riding at a furious gait, and, without any warning or attempt to turn to either side or check his horse, rode over and seriously injured plaintiff. (Stanfield v. Anderson, 1.)

SALARY. See Offices and Officers, 4, 5, 17.

SALE.

Duplicate certificate under execution, filed. See Executions, 2.
See Bonds, 1, 2; Mines and Mining, 8.

SCHOOLS.

1. **SCHOOLS—UNION HIGH-SCHOOL DISTRICT—ESTABLISHMENT—ELECTION—MAJORITY OF VOTES IN WHOLE DISTRICT SUFFICIENT TO ESTABLISH—LAWS ARIZ. 1895, ACT NO. 32, APPROVED MARCH 18, 1895, CONSTRUED.**—If under act No. 32, *supra*, for the establishment of union high-school districts, trustees of a school district having a certain population petition the school superintendent for the establishment of a union high-school district, said superintendent shall order an election therein for that purpose. In order that a union high-school district may be formed of two or more adjoining school districts, it is necessary that a majority of the trustees of each of the school districts shall petition for that purpose, and when that is done an election must be ordered therein. In such case, each of said school districts is a part of the proposed union high-school district, made such by the said petition. If at the election therein a majority of the votes in the district, as a whole, are for the union high-school district, it is then a district; otherwise, it is not. (Sharp v. George, 65.)
2. **SAME—SAME—ELECTION—MAJORITY OF VOTES—LAWS ARIZ. 1895, ACT NO. 32, APPROVED MARCH 18, 1895, CONSTRUED.**—"If a majority of such votes be cast in favor of a high school, . . ." as used in section 3 of act No. 32, *supra*, means the majority of those voting, and has no reference to the number of qualified electors residing in the district. (Sharp v. George, 65.)
3. **SAME—SAME—SAME—NOTICE OF ELECTION—FAILURE TO HOLD ELECTION IN SINGLE DISTRICT—NOT AFFECTING THE RESULT—DOES NOT AVOID ELECTION.**—Accidental failure to give notice of election and to hold election in one district to be consolidated into a union high-school district will not render void an election therefor where it appears that if all the qualified voters in such district had voted against the proposition the result would not have been changed. (Sharp v. George, 65.)
4. **SAME—SAME—SAME—NOTICES—SUFFICIENCY—LAWS ARIZ. 1891, ACT NO. 16, CITED.**—Notices of election for union high-school district given according to the provisions of act No. 16, *supra*, are sufficient, this act governing the case. (Sharp v. George, 65.)

SECOND JUDGE.

Called in. See Courts, 1.

SECTION FOREMAN. See Master and Servant, 4.

SEPARATE COUNTS. See Pleading, 9, 10.

SEPARATE PROPERTY. See Fraudulent Conveyances, 1.

SERVICE. See Taxes and Taxation, 1, 2.

SEVERAL BONDS. See Offices and Officers, 6.

SHACKLING PRISONER. See Criminal Law, 8.

SHARES. See National Banks, 1, 2, 3.

SHERIFF. See Claim and Delivery, 3; Exemptions, 3, 4; Offices and Officers, 11, 12, 13, 14, 15, 16, 17.

SLANDER. See Malicious Prosecution, 1.

SOVEREIGNTY. See Territories, 1.

SPECIAL CONTRACT. See Irrigation, 1.

SPECIAL LAW. See Constitutional Law, 3.

STATEMENT OF FACTS. See Appeal and Error, 3.

STATUTE OF FRAUDS. See Pleading, 8.

STATUTORY CONSTRUCTION. See Exemptions, 1; Personal Property, 1.

STAY BOND. See Appeal and Error, 4.

STEER. See Criminal Law, 14.

SUBPCENA. See Witnesses, 1.

SUMMONS.

1. SUMMONS — SERVICE — DEFECTS — WAIVED BY ANSWER—REV. STATS. ARIZ. 1887, PAR. 721, CITED.—Defects in the manner of the service of summons are waived and cured by answer and appearance in the trial court, under the statute, *supra*, providing that "the filing of an answer shall constitute an appearance of the defendant, so as to dispense with the necessity for the issuance or service of summons upon him." (Clark v. Morrison, 349.)

SUNDAY.

When not counted in computing time. See Answer, 1.

SUPERIOR. See Master and Servant, 4.

SUPERVISORS.

Action for compensation. See Offices and Officers, 18, 19, 20, 21.

SUPPLEMENTAL PROOF. See Evidence, 8.**SURETY.**

Judgment against on appeal bond. See Appeal and Error, 4.

Of sheriff, liabilities. See Exemptions, 4.

On official bonds, liabilities. See Offices and Officers, 6, 7, 8, 9, 14, 15.

See Choses in Action, 1; Negotiable Instruments, 1, 2, 10.

SURVIVAL. See Abatement, 1.**TAXES AND TAXATION.**

1. **TAXES AND TAXATION—EVIDENCE—RECITALS IN TAX-DEEDS—LAWS 1893, ACT NO. 84, SECS. 20 AND 22, CITED—PRIMA FACIE EVIDENCE—FILING AFFIDAVIT—NOTICE OF INTENTION TO APPLY FOR TAX-DEED—SERVICE ON OWNER.**—Recitals in a tax-deed that the plaintiff and grantee has filed with the treasurer an affidavit showing that notice was served upon Katzenstein (the person owing said taxes) as is by law in such cases required, are only *prima facie* evidence, under section 22, *supra*, that an affidavit was filed, but are no evidence of the contents of the affidavit or the notice, or that the notice was served upon the owner of the property, as is required by section 20, *supra*. (Hereford v. O'Connor, 258.)
2. **SAME—TAX-DEEDS—SERVICE OF NOTICE OF INTENTION TO APPLY FOR—MUST BE ON OWNER.**—The person to whom land is taxed is not the proper person upon whom to serve notice of intention to apply for a tax-deed when the statute requires it to be served upon the owner of the land. (Hereford v. O'Connor, 258.)
3. **SAME—EVIDENCE—RECITALS IN TAX-DEEDS—MUST RECITE SUBSTANCE OF AFFIDAVIT AND NOTICE.**—Recitals in a tax-deed, to dispense with supplemental evidence, that notice had been served, should recite the substance of the affidavit, and the affidavit should show the contents of the notice. (Hereford v. O'Connor, 258.)
4. **SAME—TAX-DEEDS—JUDGMENT—AGAINST HOLDER—FAILURE TO ADJUDGE REFUND OF MONEY PAID—LAWS 1893, ACT NO. 84 SEC. 26, CONSTRUED—APPEAL AND ERROR—MODIFICATION.**—Where the judgment in favor of a successful claimant of land sold under tax-deed fails to provide for payment to the holder of the tax-deed of the moneys expended by him, as provided in section 26, *supra*, it will on appeal, if there is no other error, be modified to that extent. (Hereford v. O'Connor, 258.)

See Constitutional Law, 4, 5; National Banks, 1, 2, 3.

TAX-DEEDS. See Taxes and Taxation, 1, 2, 3, 4.

TERRITORIES.

1. TERRITORIES—SOVEREIGNTY—POWERS OF LEGISLATURE—INDIAN RESERVATION—RESERVATIONS—MARRIAGE OF WHITE MAN AND INDIAN—ON RESERVATION—VOID—COMP. LAWS ARIZ. 1877, SEC. 3, CITED.—There is but one sovereignty in Arizona—that of the United States—which delegates its power to legislature of the territory; and the legislative acts of the territory being operative in all parts of the territory, including Indian and all other executive or legislative reservations, unless expressly forbidden by the Congress of the United States, a marriage of a white man and Indian squaw according to the customs of her tribe is void, though established upon an Indian reservation. Statutes, *supra*, cited. (Estate of Walker, 70.)

TESTIMONY.

Disregarding, where witness swears falsely to material fact.
See Witnesses, 3.

TIME.

Computation of. See Answer, 1.
Holidays, when excluded. See Answer, 1.
Sunday, when excluded. See Answer, 1.
To answer. See Answer, 1.

TITLE. See Ejectment, 3.

TRANSCRIPT. See Appeal and Error, 13.

TREASURER, TERRITORIAL. See Offices and Officers, 22.

TREASURY TRANSCRIPT. See Evidence, 1, 6, 7, 8.

TRESPASS. See Attachment, 4; Criminal Law, 18.

TRESPASSER.

When sheriff becomes. See Attachment, 6.
See Criminal Law, 18.

TRIAL.

1. TRIAL—DEMURRER TO THE EVIDENCE—NATURE OF—IMPROPER PRACTICE—INVOLUNTARY NONSUIT—GRANTING IMPROPER—BRYAN V. PINNEY, 3 ARIZ. 34, CITED—INSTRUCTION TO THE JURY TO RETURN VERDICT FOR DEFENDANT—PROPER PRACTICE.—A demurrer to the evidence takes from the jury all consideration of the case, and the judgment is rendered by the court alone, and it operates in the same way as a motion for a nonsuit. It has been decided by this court in *Bryan v. Pinney*, *supra*, that an involuntary nonsuit can-

TRIAL (Continued).

not be allowed under the statutes of Arizona. The proper practice under the Arizona statute is by an instruction to the jury. (*Roberts v. Smith*, 368.)

2. **SAME—JURY—INSTRUCTION TO RETURN VERDICT FOR DEFENDANT—WHEN GRANTED.**—The court may instruct the jury to return a verdict for the defendant when it appears that upon the case made by plaintiff's evidence, all taken as true, the defendant is not liable; that, taking the evidence in its strongest light against the defendant, the plaintiff has presented no case upon which he is entitled to recover. (*Roberts v. Smith*, 368.)

3. **TRIAL—JURY—DIRECTION OF VERDICT—TEST OF RIGHT TO.**—In this jurisdiction the court may, in a proper case, direct a verdict; but, to authorize such action, the evidence and the reasonable inferences to be drawn therefrom must be insufficient to support a verdict in favor of the party having the *onus* of proof, so that if such a verdict is returned the court would feel compelled to set it aside. (*Stanfield v. Anderson*, 1.)

See Attachment, 1; Claim and Delivery, 2; Criminal Law, 8; Pleading, 12.

UNION HIGH-SCHOOL DISTRICT. See Schools, 1, 2, 3, 4.

UNLAWFUL INCLOSURES. See Public Lands, 4.

VARIANCE. See Criminal Law, 14; Pleading, 12.

VENUE. See Courts, 1; Criminal Law, 11.

VERDICT.

Direction of. See Evidence, 2; Roads and Highways, 1; Trial, 1, 2, 3.

VERIFICATION. See Open Accounts, 1; Pleading, 1, 5, 6

VOTES. See Schools, 1, 2.

WAIVER. See Marriage, 1.

WHITE MAN AND INDIAN.

Marriage void. See Marriage, 2.

WIFE.

Personal property, title, possession by husband. See Marriage, 1.
Separate property. See Fraudulent Conveyances, 1.

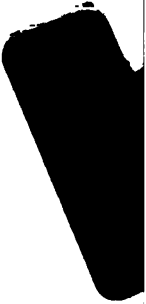
WITNESSES.

1. WITNESSES—FEES—MORTGAGE—REV. STATS. ARIZ. 1887, PAR. 1982, CONSTRUED—VOLUNTARY WITNESSES—SUBPENA—DUTY TO ATTEND OUTSIDE COUNTY.—The fee-bill for attendance and mileage of witnesses, paragraph, 1982, *supra*, applies only to witnesses who come in response to subpoena. Witnesses served without the county are not required to attend beyond the limits of the county where they reside, nor to obey a subpoena for attendance outside of their own county, and in attending court out of their own county their attendance is voluntary, and they are not entitled either to *per diem* or mileage. (Hereford v. O'Connor, 258.)
2. SAME—SAME—SAME—PARTY—HUSBAND OR WIFE—COMMUNITY PROPERTY.—A party to a suit is not entitled to witness-fees, nor is a husband or wife entitled to fees while attending court as a witness for each other as parties in a suit involving the property of either not shown to be other than community property. (Hereford v. O'Connor, 258.)
3. WITNESSES—SWEARING FALSELY TO MATERIAL FACT—DISREGARDING TESTIMONY—INSTRUCTION.—It is error to instruct that the whole testimony of a witness who has sworn falsely as to a material fact may be disregarded. Before the jury can disregard the testimony of a witness it must appear that the witness has knowingly and intentionally sworn falsely. (Schultz v. Territory of Arizona, 239.)

See Criminal Law, 3.

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